# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1901.**

No. 122

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CLEMENT STUDEBAKER, PLAINTIFF IN ERROR,

*vs.*

JOHN PERRY, AS RECEIVER OF THE NATIONAL BANK OF KANSAS CITY.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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**FILED JULY 31, 1900.**

**(17,852.)**

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*Transcript of Record.*

ie United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1899.

CLEMENT STUDEBAKER, Plaintiff in Error,
*vs.*
PERRY, as Receiver of the National Bank of Kansas City, Defendant in Error. } No. 672.

r. Hugh C. Ward, Mr. Daniel Rich, counsel for plaintiff in
.
r. George W. Wall, Mr. Walter W. Ross, Mr. Marshall J. Kirk-, counsel for defendant in error.

r to the circuit court of the United States, northern district of Illinois, northern division.

anscript of record filed March 15, 1900. Printed record filed 26, 1900.

EDWARD M. HOLLOWAY, *Clerk.*

*Pleas.*

eas in the circuit court of the United States for the northern ict of Illinois, northern division, began and held at the United s court-room, in the city of Chicago, in said district and division, e the Honorable Christian C. Kohlsaat, district judge of the ed States for the northern district of Illinois, on Saturday, the nteenth day of February, in the year of our Lord one thousand hundred, being one of the days of the regular December term id court, 1899, and of our Independence the one hundred and ty-fourth year.

S. W. BURNHAM, *Clerk.*

*Præcipe for Summons. Filed Nov.* 9, 1899.

PERRY, as Receiver of the National Bank of Kansas City,
*vs.*
CLEMENT STUDEBAKER. } #25357. Assumpsit.

it remembered that on this day to wit: the ninth day of No-er, in the year of our Lord one thousand eight hundred and y-nine came the plaintiff in said entitled cause by his attorneys iled in the clerk's office of said court his præcipe for summons bond for costs, which said præcipe and bond for costs are re-ively in the words and figures following to wit:

*Pracipe.*

United States Circuit Court, Northern District of Illinois.

JOHN PERRY, as Receiver of the National Bank of Kansas City, Plaintiff,
*vs.*
CLEMENT STUDEBAKER, Defendant.
} Pracipe.

The clerk of said court will issue a summons in the above-entitled cause in a plea of trespass on the case on promises to the damage of the plaintiff in the sum of two thousand ($2,000.00) dollars, and direct the same to the marshal to execute and make it returnable to the Dec. term of said court, A. D. 189–.

WALL & ROSS,
*Plaintiff's Attorneys.*

Nov. 9, 1899.

(Endorsed:) Filed Nov. 9, 1899. S. W. Burnham, clerk.

3 *Bond for Costs. Filed Nov.* 9, 1899.

Bond for costs.

UNITED STATES OF AMERICA,
*Northern District of Illinois, Northern Division,* } *ss:*

Circuit Court, December Term, A. D. 1899.

JOHN PERRY, as Receiver of the National Bank of Kansas City,
*vs.*
CLEMENT STUDEBAKER.
} In —.

I herewith enter myself as security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the said plaintiff of any costs ordered or adjudged to be paid by said plaintiff hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against said plaintiff.

Dated the — day of ——, A. D. —.

MARSHALL M. KIRKMAN,
*Residence: Evanston, Ills.*

I, M. M. Kirkman, a surety on the annexed bond, being duly sworn, depose and say that I am worth in real estate, situated in the northern district of Illinois, the sum of four hundred dollars, over and above my just debts and liabilities.

M. M. KIRKMAN.

Sworn to and subscribed before me this ninth day of November, 1899.

MARSHALL J. KIRKMAN,
[SEAL.] *Notary Public.*

(Endorsed:) Filed Nov. 9, 1899. S. W. Burnham, clerk.

On the same day to wit: the ninth day of November, 1899, came the plaintiff in said entitled cause by his attorney and filed in the clerk's office of said court a certain declaration in words and figures following to wit:

4 *Declaration. Filed Nov. 9, 1899.*

Declaration.

UNITED STATES OF AMERICA, }
*Northern District of Illinois, Northern Division,* } *ss:*

In the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division.

JOHN PERRY, as Receiver of the National Bank of Kansas City,
*vs.*
CLEMENT STUDEBAKER. } Declaration.

John Perry, as receiver of the National Bank of Kansas City, plaintiff, in this suit, by Wall & Ross, his attorneys, complains of Clement Studebaker, defendant, of a plea that he render unto the plaintiff the sum of two thousand ($2,000.00) dollars, which he owes to and unjustly detains from the plaintiff.

For that, whereas, heretofore to wit: on the 13th day of April, 1886, said The National Bank of Kansas City was organized as a national banking association, under the laws of the United States, with a capital stock of one million ($1,000,000.00) dollars divided into ten thousand (10,000) shares, of one hundred ($100) dollars each, and the Comptroller of the Currency of the United States did, pursuant to law, on, to wit: the 13th day of April, A. D. 1886, give and issue to said The National Bank of Kansas City, in the city of Kansas City, in the county of Jackson, and State of Missouri, a certificate under his hand and official seal that said The National Bank of Kansas City had complied with all the provisions of law required to be complied with before commencing the business of banking; and that such association was authorized to commence the business of banking; and thereupon the said The National Bank of Kansas City did commence the business of banking, under and pursuant to the laws of the United States, and did continue to carry on the business of banking under the laws of the United States until afterwards, to wit: the 18th day of March, A. D. 1895.

And the plaintiff further avers that on to wit: the 18th day of March, A. D. 1895, said The National Bank of Kansas City being

then insolvent, suspended business and the payment of its
5 obligations; and afterwards, on, to wit: the 18th day of March, A. D. 1895, George W. Galbreath was, by the Comptroller of the Currency of the United States, in pursuance of the laws of the United States, duly appointed receiver of the said The National Bank of Kansas City, and entered upon the discharge of his duties as such receiver, and that afterwards, to wit: on the 12th day of April, A. D. 1895, the said George W. Galbreath resigned his said trust and office as receiver of said bank, as aforesaid, and thereupon, and on, to wit: the 12th day of April, A. D. 1895, the plaintiff was by the Comptroller of the Currency of the United States, in pursuance of the laws of the United States, duly appointed and commissioned receiver of said The National Bank of Kansas City to take effect on the 17th day of April, A. D. 1895.

And thereupon, upon the same day last aforesaid, qualified and entered upon the discharge of his duties as such receiver, and from thence hitherto has been and still is acting as such receiver of the said The National Bank of Kansas City, located in the city of Kansas City, in the county of Jackson, and State of Missouri, of which State he is a citizen.

And the plaintiff further avers that the defendant is now and for many years past has been a resident and citizen of the city of South Bend, county of St. Joseph and State of Indiana, and that at the time said The National Bank of Kansas City suspended business and payment of its obligations on, to wit: the 18th day of March, A. D. 1895, was, and now is, the owner of one hundred and eighty-nine (189) shares of the capital stock of the said The National Bank of Kansas City, of the par value of one hundred dollars ($100) each of which stood and stands in his name upon the books of said banking association.

And the plaintiff further avers that the defendant has in writing agreed to submit in this cause to the jurisdiction of this court in this district first above set forth.

And the plaintiff further avers that afterwards, to wit: on the 11th day of February, 1896, it appeared to the satisfaction of the Comptroller of the Currency of the United States, that in order to pay the debts of said The National Bank of Kansas City, it was necessary to enforce the individual liability of the shareholders of said banking association, as provided by the statutes of the United States to the extent of sixteen ($16) dollars, upon each and every share of the capital stock of the said The National Bank of Kansas City, held or owned by said shareholders at the time said banking association suspended business and the payment of its obligations; and thereupon the Comptroller of the Currency of the United States did, on to wit: the 11th day of February, A. D. 1896, make an assessment and requisition upon the shareholders of said The National
6 Bank of Kansas City for one hundred and sixty thousand ($160,000) dollars to be paid by them ratably, and did direct the plaintiff to take all necessary proceedings by suit or otherwise, to enforce the said individual liability of the said shareholders, and that pursuant to said assessment and requisition the defendant did

pay unto the plaintiff the sum of three thousand and twenty-four ($3,024) dollars, being sixteen ($16) dollars upon each share of the one hundred and eighty-nine share of stock of said banking association held by him.

And the plaintiff further avers that thereafter, on, to wit: the 25th day of February, A. D. 1899, the said Comptroller of the Currency found and determined that the said sum of one hundred and sixty thousand ($160,000) dollars which was levied and assessed by said Comptroller of the Currency against the shareholders as aforesaid, on the 11th day of February, A. D. 1896, was inadequate and insufficient to pay the debts of the said The National Bank of Kansas City, and that in order to pay the debts of the said The National Bank of Kansas City, it was necessary to enforce the individual liability of the shareholders of said banking association as provided by the statutes of the United States, to the extent of seven ($7.00) dollars per share upon each and every share of the capital stock of said The National Bank of Kansas City held or owned by said shareholders at the time said banking association suspended business and the payment of its obligations; and thereupon, the Comptroller of the Currency of the United States did, on to wit: the 25th day of February, A. D. 1899, make such further assessment and requisition upon the shareholders of the said The National Bank of Kansas City, for seventy thousand ($70,000) dollars, to be paid by them ratably, on or before the 25th day of March, A. D. 1899, and did direct the plaintiff to take all necessary proceedings by suit or otherwise to enforce the said individual liability of the said shareholders.

And the plaintiff further avers that at the time said The National Bank of Kansas City suspended business and payment of its obligations, as aforesaid, the defendant was the owner and holder of one hundred and eighty-nine (189) shares of the capital stock of the said The National Bank of Kansas City, by means whereof, and by force of the laws of the United States the defendant then and there became liable to the plaintiff to the amount of said assessment and requisition upon him as aforesaid, being the sum of one thousand, three hundred and twenty-three ($1,323.00) dollars, said amount being seven dollars ($7.00) upon each share of the capital stock of the said The National Bank of Kansas City owned and held by said defendant, at the time the said The National Bank of Kansas City suspended business and the payment of its obligations, as aforesaid.

7 Yet the defendant, though often requested, has not paid the said sum of money, or any part thereof, to the plaintiff, but so to do has hitherto wholly refused and still does refuse, to the damage of the plaintiff of two thousand ($2,000) dollars, and therefore he brings his suit, etc.

WALL & ROSS,
*Attorneys for Plaintiff.*

UNITED STATES OF AMERICA, }
*State of Illinois, County of Cook,* } ss:

Walter W. Ross being duly sworn on oath says that he is one of the attorneys for John Perry, the receiver of the National Bank of Kansas City, plaintiff in the above-entitled cause, that the demand of the plaintiff is upon the cause of action set forth in the foregoing declaration, and that there is due to the plaintiff from the defendant upon said cause of action, after allowing the defendant all just credits, deductions and set-offs, the sum of one thousand three hundred and twenty-three ($1,323.00) dollars, together with interest thereon from and after the 25th day of March, A. D. 1899, at the rate of six (6%) per cent. per annum.

WALTER W. ROSS.

Subscribed and sworn to before me, this 9 day of Nov., A. D. 1899.

S. W. BURNHAM, *Clerk.*

(Endorsed:) Filed Nov. 9, 1899. S. W. Burnham, clerk.

Afterwards, to wit, on the twenty-second day of November, 1899, came the defendant by his attorneys and entered his appearance in the clerk's office in said cause in words and figures following, to wit:

8 *Appearance for Defendants. Filed Nov. 22, 1899.*

Appearance.

UNITED STATES OF AMERICA, }
*Northern District of Illinois, Northern Division,* } ss:

In the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division.

JOHN PERRY, as Receiver of the National Bank of Kansas City, }
*vs.*
CLEMENT STUDEBAKER. }

We hereby enter our appearance in the above-entitled cause for Clement Studebaker, defendant, and submit to the jurisdiction of this court in this district.

HUGH C. WARD AND
RICH & RICH,
*Att'ys for Defendant.*

(Endorsed:) Filed Nov. 22, 1899. S. W. Burnham, clerk.

Afterwards, to wit, on the sixteenth day of December, 1899, came the defendant by his attorneys and filed in the clerk's office of said court his demurrer in words and figures following, to wit:

9 *Demurrer. Filed Dec.* 16, 1899.

Demurrer.

UNITED STATES OF AMERICA, }
*Northern District of Illinois, Northern Division,* } *ss:*

In the Circuit Court of the United States in and for the Northern District of Illinois, Northern Division.

JOHN PERRY, as Receiver of the National Bank of Kansas City,
*vs.*
CLEMENT STUDEBAKER. } Demurrer.

And the said defendant, Clement Studebaker, by Hugh C. Ward and Daniel Rich, his attorneys, comes and defends the wrong and injury, when, etc., and says that the plaintiff's said declaration and the matters and things therein contained in manner and form as the same are above set forth are not sufficient in law for him the said plaintiff to maintain his aforesaid action against this defendant, and that he, the said defendant, is not bound by law to answer the same, and this he is ready to verify; wherefore for want of a sufficient declaration in this behalf the said defendant prays judgment, etc.

HUGH C. WARD AND
DANIEL RICH,
*Attorneys for Defendant.*

(Endorsed:) Filed Dec. 16, 1899. S. W. Burnham, clerk.

Afterwards, to wit, on the tenth day of February, 1900, in the December term of said court, 1899, in the record and proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

10 *Hearing on Demurrer, Feb.* 10, 1900.

Order of February 10, 1900.

JOHN PERRY, as Receiver of the National Bank of Kansas City,
*vs.*
CLEMENT STUDEBAKER. } Assumpsit. 25357.

Now come the parties by their attorneys and comes on to be heard the demurrer to the declaration herein, and the court having heard the same and not being sufficiently advised takes time to consider.

Afterwards, to wit, on the seventeenth day of February, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

*Order of Feb.* 17, 1900, *Overruling Demurrer.*

Order of February 17, 1900.

JOHN PERRY, as Receiver of the National Bank of Kansas City,
*vs.*
CLEMENT STUDEBAKER.
} Assumpsit. 25357.

Now again come the parties by their attorneys, and the court having considered and being now fully advised upon the demurrer to the declaration herein overrules the same, and the defendant being now ruled to further plead, instanter and he failing and refusing to comply with said rule, elects to stand by his demurrer. It is thereupon considered and adjudged by the court that the plaintiff have judgment against the defendant upon said demurrer, and that he have and recover the damages herein for want of further plea in the sum of one thousand five hundred four dollars and sixteen cents ($1,504.16), together with the costs herein to be taxed, and that execution issue therefor.

And now comes the defendant in open court and enters his motion for a writ of error to the United States circuit court of appeals for the seventh circuit, and the court fixes the amount of the bond on writ of error at the sum of twenty-five hundred dollars, to be filed within thirty days, together with his assignment of errors. Said bond when filed to operate as a supersedeas & execution is stayed for thirty days.

11 And on the second day of March, 1900, came Clement Studebaker by his attorney and filed in the clerk's office of said court his petition for writ of error in words and figures following, to wit:

*Petition for Writ of Error. Filed March* 2, 1900.

Petition for writ of error.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

JOHN PERRY, Receiver of the National Bank of Kansas City, Plaintiff,
*vs.*
CLEMENT STUDEBAKER, Defendant.
} No. 25357.

*Petition for Writ of Error.*

Comes now Clement Studebaker, the defendant in the above-entitled cause, and complaining of the plaintiff, John Perry, receiver of the National Bank of Kansas City, says that on the 17th day of February, 1900, said plaintiff recovered a judgment against the said

defendant herein, in said court, for the sum of one thousand five hundred four and $\frac{16}{100}$ dollars ($1,504.16) and also recovered judgment for cost in said action to be taxed by the clerk; and this defendant alleges that he was prejudiced by the various orders and rulings in said cause, and that there is error in the proceedings, by which said judgment was obtained, and that the said judgment is erroneous, and the said order and rulings, prejudicial in respect to matters and things as shown by the assignment of errors filed herewith, and by the record in said cause.

And by reason of said errors, the said defendant prays that he may be allowed a writ of error from said judgments of said court in said cause, to the United States circuit court of appeals for the seventh circuit, and that a transcript of the record and proceedings duly authenticated may be sent to said court of appeals, whereupon said judgment may be reversed and said cause remanded to
12 this court for a new trial. And whereby this defendant may be given such other and further relief as may be just and proper.

CLEMENT STUDEBAKER,
By DANIEL RICH AND
HUGH C. WARD,
*His Attorneys.*

(Endorsed:) Filed Mar. 2, 1900. S. W. Burnham, clerk.

On the same day to wit: the second day of March, 1900, came Clement Studebaker, by his attorney and filed in the clerk's office of said court his assignment of errors in words and figures following to wit:

*Assignment of Errors. Filed March 2, 1900.*

Assignment of errors.

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

JOHN PERRY, Receiver of the National Bank of Kansas City, Plaintiff,
*vs.*
CLEMENT STUDEBAKER, Defendant.
No. 25357.

*Assignment of Errors.*

The defendant, Clement Studebaker, assigns as errors the following rulings and orders made by the trial court on the trial of this cause, to wit:

1. The trial court erred in overruling defendant's demurrer to plaintiff's declaration, which demurrer in words and figures, was as follows, to wit:

"And the said defendant, Clement Studebaker by Hugh C. Ward and Daniel Rich, his attorneys, comes and defends the wrong and injury, when etc., and says, that the plaintiff's said declaration and

the matters and thing- therein contained in manner and form as the same are above set forth are not sufficient in law for him, the said plaintiff to maintain his aforesaid action against this defendant, and that he, the said defendant, is not bound by law to answer
13 the same, and this he is ready to verify: wherefore, for want of a sufficient declaration in this behalf the said defendant prays judgment, etc."

2. The trial court erred in holding plaintiff's declaration sufficient in law, and in ruling that defendant further plead to plaintiff's declaration.

3. The trial court erred in rendering a judgment against defendant upon defendant refusing to plead further, for the reason that the matters and things in plaintiff's declaration, contained in manner and form as therein set forth are not sufficient in law for said plaintiff to maintain his action against the defendant.

4. The trial court erred in rendering a judgment against defendant for the reason that plaintiff's declaration, and the matters and things therein contained in manner and form as the same are set forth therein, are not sufficient in law for said plaintiff to maintain his action against this defendant, and to entitle him to judgment against this defendant.

DANIEL RICH,
HUGH C. WARD,
*Attorneys for Defendant.*

(Endorsed:) Filed March 2, 1900. S. W. Burnham, clerk.

On the same day, to wit, the second day of March, 1900, came Clement Studebaker, as principal, and Timothy W. Witwer, as surety, and filed in the clerk's office of said court a certain bond on writ of error in words and figures following, to wit:

*Bond on Writ of Error. Filed March 2, 1900.*

Bond on writ of error.

Know all men by these presents that we, Clement Studebaker as principal, and Timothy W. Witwer as sure*ties*, are held and firmly bound unto John Perry, receiver of the National Bank of Kansas City, in the full and just sum of twenty-five hundred dollars, to be paid to the said John Perry, receiver, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of February, in the year of our Lord one thousand nine hundred.

Whereas lately, at a regular term of said court (the December term, 1899), of the United States circuit court, northern dis-
14 trict of Illinois, northern division, in a suit pending in said court between John Perry, receiver of the National Bank of Kansas City, plaintiff, and Clement Studebaker, defendant, a judg-

ment was rendered against the said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a United States circuit court of appeals for the seventh circuit, to be holden at Chicago within 30 days from the date hereof:

Now, the condition of the above obligation is such that if the said defendant shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CLEMENT STUDEBAKER. [SEAL.]
TIMOTHY W. WITWER. [SEAL.]

Sealed and delivered in presence of—
DANIEL RICH.

Approved March 2, 1900.

KOHLSAAT, *J.*

(Endorsed:) Filed March 2, 1900. S. W. Burnham, clerk.

On the same day, to wit, the second day of March, 1900, in the December term of said court, 1899, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

*Order of March 2, 1900, Allowing Writ of Error.*

Order of March 2, 1900.

JOHN PERRY, as Receiver of the National Bank of Kansas City,
*vs.*
CLEMENT STUDEBAKER. } Assumpsit. 25357.

Now comes the defendant, by Messrs. Rich and Rich, his attorneys, and presents his petition for writ of error, assignment of errors, and bond on writ of error, and thereupon it is ordered that a writ of error issue to the United States circuit court of appeals for the seventh circuit, returnable in thirty days from this date, and it is ordered that the bond filed herein shall be and operate as a supersedeas to the judgment entered herein.

15 *Writ of Error. Filed March 2, 1900.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you,

or some of you, between John Perry, receiver of the National Bank of Kansas City, plaintiff, and Clement Studebaker, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the seventh circuit, together with this writ, so that you have the same in the said United States circuit court of appeals for the seventh circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals for the seventh circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of March, in the year of our Lord one thousand nine hundred.

S. W. BURNHAM,
[SEAL.] *Clerk of the Circuit Court of the United States for the Northern Dist. of Illinois.*

Allowed by—
KOHLSAAT, *Judge.*

16 *Return to Writ of Error. Filed March 2, 1900.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the United States circuit court of appeals for the seventh circuit, a true and complete transcript of the record and proceedings in the foregoing-entitled cause this 15th day of March, A. D. 1900.

S. W. BURNHAM,
*Clerk United States Circuit Court, Northern District of Illinois.*

(Endorsed:) Filed March 2, 1900. S. W. Burnham, clerk.

*Clerk's Certificate.*

NORTHERN DISTRICT OF ILLINOIS, *Northern Division,* } *ss:*

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record on said court in the cause entitled John Perry, as receiver of the National Bank of Kansas City *vs.* Clement Studebaker, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district, this 15th day of March, 1900.

[SEAL.] S. W. BURNHAM, *Clerk.*

*Citation. Filed March* 2, 1900.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to John Perry, receiver of the National Bank of Kansas City, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the seventh circuit, to be holden at Chicago, Illinois, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, wherein Clement Studebaker is plaintiff in error, and you are defendant in error, to show cause, if any
17 there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, judge of the circuit court of the United States, this second day of March, in the year of our Lord one thousand nine hundred.

KOHLSAAT, *Judge.*

We hereby acknowledge due service of the within citation this 2d day of March, 1900.

WALL & ROSS,
*Att'ys for Defendant in Error.*

(Endorsed:) Filed March 2, 1900. S. W. Burnham, clerk.

18 At the regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the third day of October, 1899, in the October term, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the one hundred and twenty-fourth year.

And afterwards, to wit, on the seventeenth day of March, 1900, in the October term last aforesaid, came the plaintiff in error, by his counsel, Mr. Hugh C. Ward and Mr. Daniel Rich, and filed in the office of the clerk of this court their appearance, said appearance being in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1899.

CLEMENT STUDEBAKER, Plaintiff in Error,
*vs.*
JOHN PERRY, as Receiver of the National Bank of Kansas City, Defendant in Error. } No. 672.

The clerk will enter my appearance as counsel for the plaintiff in error.

HUGH C. WARD AND
DANIEL RICH.

Endorsed: Filed March 17, 1900. Edward M. Holloway, clerk.

19 And afterwards, to wit, on the 26th day of March, 1900, in the October term last aforesaid, came the defendant in error, by his counsel, Mr. George W. Wall, Walter W. Ross, and Marshall J. Kirkman, and filed in the office of the clerk of this court his appearance, said appearance being in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1899.

CLEMENT STUDEBAKER, Plaintiff in Error,
*vs.*
JOHN PERRY, as Receiver of the National Bank of Kansas City, Defendant in Error. } No. 672.

The clerk will enter my appearance as counsel for the defendant in error.

GEO. W. WALL.
WALTER W. ROSS.
MARSHALL J. KIRKMAN.

Endorsed: Filed March 26, 1900. Edward M. Holloway, clerk.

20 TUESDAY, *May* 1, 1900.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. Peter S. Grosscup, circuit judge; Hon. Christian C. Kohlsaat, district judge.

Order.—It is ordered by the court that Christian C. Kohlsaat, judge of the district court of the United States for the northern district of Illinois, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Kohlsaat appeared and took his seat as a member of said court.

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| CLEMENT STUDEBAKER *vs.* JOHN PERRY, as Receiver of the National Bank of Kansas City. | 672. Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division. |

It is ordered by the court that this cause be, and the same is hereby, set down for hearing June 7, 1900.

21 MONDAY, *May* 7, 1900.

Court met pursuant to adjournment.

Present: Hon William A. Woods, circuit judge, presiding; Hon. James G. Jenkins, circuit judge; Hon. Wm. H. Seaman, district judge.

ORDER.—It is ordered by the court that William A. Seaman, judge of the district court of the United States for the eastern district of Wisconsin, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Seaman appeared and took his seat as a member of said court.

THURSDAY, *June* 7, 1900.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. Peter S. Grosscup, circuit judge; Hon. William H. Seaman, district judge.

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| CLEMENT STUDEBAKER *vs.* JOHN PERRY, Receiver, etc. | 672. Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division. |

NOW, this day, come the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral arguments by Mr. Hugh C. Ward, counsel for plaintiff in error, and by Mr. George W. Wall, counsel for defendant in error, and the court, having heard the same, takes this matter under advisement.

22 SATURDAY, *June* 23, 1900.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge, presiding; Hon. Peter S. Grosscup, circuit judge.

Before Hon. William A. Woods, circuit judge; Hon. Peter S. Grosscup, circuit judge; Hon. William H. Seaman, district judge.

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| CLEMENT STUDEBAKER *vs.* JOHN PERRY, as Receiver of the National Bank of Kansas City. | 672. Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division. |

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Illinois, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

And afterwards, to wit, on the same day, the twenty-third day of June, 1900, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court, which opinion was in the words and figures following, to wit:

23 In the United States Circuit Court of Appeals for the Seventh Circuit, May Session, A. D. 1900.

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| CLEMENT STUDEBAKER, Plaintiff in Error, *vs.* JOHN PERRY, as Receiver of the National Bank of Kansas City. | No. 672. Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division. |

Before Woods and Grosscup, circuit judges, and Seaman, district judge.

WOODS, circuit judge, delivered the opinion of the court:

This action was brought by the receiver of the National Bank of Kansas City against the plaintiff in error, Clement Studebaker, to recover the amount of an assessment of seven dollars per share upon the capital stock of the bank, of which plaintiff in error is alleged to have held 189 shares. The declaration shows a previous assessment of sixteen dollars per share, which the plaintiff in error had paid. The court overruled a demurrer to the declaration, and, the plaintiff in error refusing to plead further, gave judgment against him.

The only question urged upon our consideration is whether the Comptroller of the Currency has power under sections 5151 and 5234 to make and to enforce by a suit at law more than one assessment upon the shareholders of an insolvent national bank, if necessary to pay the debts thereof. The argument for the plaintiff is in substance the same as that of Judge Philips in Deweese, receiver, *v.* Smith, 97 Fed., 309, where the ruling was that, having recovered against a stockholder a judgment at law for the amount of an assessment, the receiver could not maintain against him a second action to recover a further assessment. The chief grounds of the

24 decision were that the stockholder's liability is upon contract and cannot be split, and that in making and directing the enforcement of an assessment the comptroller performs a quasi-judicial function, and by one exercise exhausts the power conferred upon him by the statute. Weight was also given to the statement in the report of the comptroller for 1898 (vol. 1, p. 36) "that for 33 years after the adoption of the national banking act, by all his predecessors in office this statute had received the construction, in practice, that but one assessment was enforcible;" but in the main the conclusion declared was deduced from the opinion of the supreme court in Kennedy *v.* Gibson, 8 Wall., 498–505.

The weight of authority and the better reason seem to us to be in favor of the comptroller's right to make successive assessments, as found necessary; which may be forced in equity or by actions at law at the option of the receiver. It was conceded at the hearing that an action at law upon an assessment for less than the par value of the stock is maintainable.

In Kennedy *v.* Gibson it was said: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. * * * This action on his part is indispensable, * * * and must precede the institution of suit by the receiver. * * * The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. * * * When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made codefendants. * * * The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use."

Following this, in an opinion written by the same judge, in United States *v.* Knox, 102 U. S., 422, is a distinct recognition of the power of the comptroller to make successive assessments, and it is an anomalous proposition that the power may be affected or cut off at the will of the receiver by proceeding to collect an assessment by an action at law instead of a suit in equity. Indeed, the
25 contention here is that merely by making one assessment for less than the entire amount of the stock the comptroller deprives himself of the power to make another, and that no more than one assessment can be collected, unless the shareholders shall refuse to pay the first and the receiver shall choose to proceed in equity to collect it and so give the court opportunity to hold the case "for further action." See, also, Germanica National Bank *v.* Case, 131 U. S., Appendix CXLIV.

The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts "to the extent of the amount of their stock therein," and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the comptroller the receiver is authorized to enforce the shareholder's liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design. In the case of Aldrich *v.* Campbell, 38 C. C. A., 347; 97 Fed., 663, the suit was

to enforce a second assessment, the first having been fully
the power of the comptroller to make successive assessment
not denied, was considered and affirmed. In Aldrich *v.*
Fed., 78, the power though denied was affirmed by the cir
for the district of Kentucky and like rulings in unrepor
have been made at circuit in Indiana and elsewhere.

If the statute were one whose meaning could be soug
temporary construction, there is nothing in the practice of
trollers to affect our conclusion. The comptrollers hav
power to make assessments either for the entire amount o
for less, and the evidence is abundant in the reported ca
exercise of ths power in both ways. Of the effect of proc
one way or the other the question was not and in the
things could not have been for their decision, and it does n
that any of them ever assumed to decide it.

The judgment is affirmed.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the
the United States circuit court of appeals for the seven
Greeting:

Because in the record and proceedings, as also in the re
the judgment of a plea which is in the said United Sta
court of appeals, before you or some of you, between Clem
baker, plaintiff in error, and John Perry, as receiver of the
Bank of Kansas City, defendant in error, a manifest error
pened, to the great damage of the said plaintiff in error,
complaint appears, we, being willing that error, if any h
should be duly corrected and full and speedy justice d
parties aforesaid in this behalf, do command you, if jud
therein given, that then, under your seal, distinctly and op
send the record and proceedings aforesaid, with all things
ing the same, to the Supreme Court of the United States
with this writ, so that you have the same in the said Supre
at Washington, within 30 days from the date hereof, that,
and proceedings aforesaid being inspected, the said Supre
may cause further to be done therein to correct that erro
right and according to the laws and customs of the Uni
should be done.

Witness the Honorable M
Seal of the Supreme Court of the United States. Fuller, Chief Justice of th
States, the 29 day of June, in t
our Lord one thousand nine h

JAMES H. McKENNE
*Clerk of the Supreme Court of the Unite*

Allowed by—
DAVID J. BREWER,
*Associate Justice of the Supreme*
*Court of the United States.*

June 29th, 1900.

27 [Endorsed:] Clement Studebaker, plaintiff in error, *vs.* John Perry, receiver National Bank of Kansas City. Writ of error. Filed Jul- 23, 1900. Edward M. Holloway, clerk. Copy deposited for defendant in error in the clerk's office of the United States circuit court of appeals for the seventh circuit. Ward & Hadley, attorneys-at-law, 409 Nat. Bank Commerce bldg., Kansas City, Mo.

28 And afterwards, to wit, on the same day, the 23rd day of July, 1900, in the October term aforesaid, the plaintiff in error filed in the office of the clerk of this court his appeal bond, said appeal bond being in the words and figures following, to wit:

UNITED STATES OF AMERICA, *set:*

CLEMENT STUDEBAKER, Plaintiff in Error,
*vs.*
JOHN PERRY, Receiver National Bank of Kansas City, Defendant in Error.

*Bond.*

Know all men by these presents that we, Clement Studebaker and Hugh C. Ward, are held and firmly bound unto John Perry, receiver of the National Bank of Kansas City, in the full and just sum of three thousand dollars ($3,000.00), to be paid to the said John Perry, receiver: to which payment, well and truly to be made, we bind ourselves, our heirs and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of June, in the year of our Lord 1900.

Whereas lately, at the October term of the circuit court of appeals of the United States in and for the seventh judicial circuit, in a suit pending in said court between Clement Studebaker, plaintiff in error, and John Perry, receiver of the National Bank of Kansas City, defendant in error, judgment was rendered against the said plaintiff in error, and the said plaintiff in error has obtained a writ of error to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Perry, receiver,

29 citing and admonishing the said John Perrry, receiver, to be and appear in the Supreme Court of the United States, at the city of Washington, D. C.

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

CLEMENT STUDEBAKER, [SEAL.]
By WARD & HADLEY, *His Att'ys.*
HUGH C. WARD. [SEAL.]

Signed, sealed in the presence of—
I. C. VAN DEVENTER.

Bond approved as a supersedeas this 29th day of June, 1900.
DAVID J. BREWER, *Justice.*

STATE OF MISSOURI, } *ss:*
*County of Jackson,* }

I, Hugh C. Ward, of the county of Jackson, State of Missouri, the surety named in the within bond, do swear that I am worth in my own right more than ten thousand dollars ($10,000.00) over and above all my debts, liabilities, and legal exemptions.
(Signed) HUGH C. WARD.

Subscribed and sworn to before me this 29th day of June, 1900. My term expires 31st day of December, 1902.
[SEAL.] (Signed) I. C. VAN DEVENTER,
*Notary Public, Jackson County, Ill.*

Endorsed: Filed July 23, 1900. Edward M. Holloway, clerk.

30 UNITED STATES OF AMERICA, *ss:*

To John Perry, receiver of the National Bank of Kansas City
Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the seventh circuit, wherein Clement Studebaker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand nine hundred.

DAVID J. BREWER,
*Associate Justice of the Supreme Court of the United States.*

On this — day of July, 1900, in the year of our Lord one thousand nine hundred, personally appeared before me the subscriber and makes oath that he delivered a true copy of the within citation to —— ——, one of the attorneys for defendant in error.

—— ——.

Subscribed and sworn to the — day of July, A. D. 1900.

—— ——.

31 [Endorsed:] Ward & Hadley, attorneys-at-law, 409 Nat. Bank Commerce bldg., Kansas City, Mo.

I. C. Cope, being first duly sworn, upon oath deposes and says that he served the within writ upon Messrs. Wall & Ross, attorneys for John Perry, receiver of the National Bank of Kansas City, by delivering a true copy thereof to Walter W. Ross, a member of the firm of Wall & Ross, on the 23rd day of July, A. D. 1900. He was unable to find the within-named John Perry within the northern district of Illinois.

I. C. COPE,
*Deputy U. S. Marshal.*

Subscribed and sworn to before me this 23rd day of July, A. D. 1900.

[Seal of M. E. Patterson, Notary Public, Cook County, Ill.]

M. E. PATTERSON,
*Notary Public, Cook Co., Ill.*

| | |
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| 1 service | 2.00 |
| 1 mile | .06 |
| | 2.06 |

32 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from one to 29, inclusive, contain a true copy of the transcript of record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of Clement Studebaker, plaintiff in error, *vs.* John Perry, as receiver of the National Bank of Kansas City, defendant in error, No. 672, October term, 1899, as the same remains upon the files and records of the United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this twenty-fourth day of July, A. D. 1900.

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Endorsed on cover: File No., 17,852. U. S. circuit court appeals, 7th circuit. Term No., 122. Clement Studebaker, plaintiff in error, *vs.* John Perry, as receiver of the National Bank of Kansas City. Filed July 31st, 1900.

No. 122.

M. of Ward for P. E.

Office Supreme Court U.S.
FILED
OCT 21 1901
JAMES H. MCKENNEY,
Clerk.

Filed Oct. 21, 1901.

# Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

CLEMENT STUDEBAKER,
*Plaintiff in Error,*
*vs.*
JOHN PERRY, as Receiver of The National Bank of Kansas City,
*Defendant in Error.*

No. 122.

**In Error to the United States Circuit Court of Appeals for the Seventh Circuit.**

## BRIEF FOR PLAINTIFF IN ERROR.

HUGH C. WARD,
*for Plaintiff in Error.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

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CLEMENT STUDEBAKER,
*Plaintiff in Error,*
*vs.*
JOHN PERRY, as Receiver of The National Bank of Kansas City,
*Defendant in Error.*

No. 122.

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## STATEMENT OF CASE.

This suit was commenced the 9th day of November, 1899, in the Circuit Court of the United States in and for the Northern District of Illinois, by John Perry, as Receiver of the National Bank of Kansas City to recover of Clement Studebaker, a shareholder therein, the sum of thirteen hundred and twenty-three ($1323.00) dollars, with interest thereon from and after the 25th day of March, 1899, at the rate of six per cent (6) per annum, which plaintiff alleged in his declaration was defendant's share of an assessment and requisition of seven ($7.00) dollars, made the 25th day of February, 1899, by the Comptroller of the Currency, under the provisions of Sections 5151 and 5234 of the Revised Statutes of the United States, 1875, on each and every share of the capital stock of that bank. Plaintiff further alleged in his declaration that on the 11th day of February, 1896, the Comptroller of the Currency made an assessment and requisition of sixteen ($16.00) dollars per share on each and every share of the capital stock thereof, including the one hundred and eighty-nine (189) shares of the capital stock owned and held by the defendant, and that defendant in due time paid his portion of

such assessment and requisition. (Rec., 4-5). To plaintiff's declaration, defendant in due time and on the 16th day of December, 1899, demurred, the ground of such demurrer being that said declaration and the matters and things therein contained, in matter and form as set forth, were not sufficient in law for plaintiff to maintain his action against defendant. (Rec., 7).

Defendant's contention in the trial court on this demurrer, as well as in the Circuit Court of Appeals for the Seventh Circuit, was, and is here, that the Comptroller of the Currency was not authorized by the terms of Sections 5151 and 5234, *supra*, to make the second assessment and requisition of February the 25th, 1899, upon the shareholders of such insolvent national bank.

Afterwards, to-wit: On the 17th day of February, 1899, the trial court overruled defendant's demurrer, and defendant refusing to further plead, judgment was rendered against defendant in the sum of fifteen hundred four and 16-100 ($1504.16) dollars. (Rec , 7-8). Thereupon defendant sued out a writ of error, taking the question involved in this case to the Circuit Court of Appeals for the Seventh Circuit, for review, where on the 23rd day of June, 1900, the decision of the trial court was affirmed. (Rec., 8-12, 16).

This being a case in which the judgment of said Circuit Court of Appeals is not made final by the terms of the Circuit Court of Appeals Act of March 3, 1891, and the amount in controversy exceeding one thousand dollars, besides costs, plaintiff in error has brought this case here from said Circuit Court of Appeals by writ of error for review by this Court.

## ASSIGNMENT OF ERRORS.

1. The trial court erred in overruling defendant's demurrer to plaintiff's declaration, which demurrer in words and figures, was as follows, to-wit:

"And the said defendant, Clement Studebaker, by Hugh C. Ward and Daniel Rich, his attorneys, comes and defends the wrong and injury, when, etc., and says that the plaintiff's declaration, and the matters and things therein contained in manner and form as the same are above set forth, are not sufficient in law for

him, the said plaintiff, to maintain his aforesaid action against this defendant, and that he, the said defendant, is not bound by law to answer the same, and this he is ready to verify ; wherefore, for want of sufficient declaration in this behalf the said defendant prays judgment, etc."

2. The trial court erred in holding plaintiff's declaration sufficient in law, and in ruling that defendant further plead to plaintiff's declaration.

3. The trial court erred in rendering a judgment against defendant upon defendant refusing to plead further, for the reason that the matters and things in plaintiff's declaration contained in manner and form as therein set forth are not sufficient in law for said plaintiff to maintain his action against this defendant.

4. The trial court erred in rendering a judgment against defendant for the reason that plaintiff's declaration, and the matters and things therein contained in manner and form as the same are set forth therein, are not sufficient in law for said plaintiff to maintain his action against this defendant, and to entitle him to a judgment against this defendant.

## BRIEF OF ARGUMENT.

### I.

The question, and the only question presented by this record for determination by this court, is whether the comptroller of the currency has the power under the terms of Sections 5151 and 5234, R. S. U. S. 1875, to make a second assessment upon shareholders of an insolvent national bank to pay its debts and enforce the payment thereof. In other words, whether the comptroller of the currency is authorized by these sections to enforce by several suits the individual liability of a shareholder of an insolvent national bank to pay the debts of such bank. The question is not whether the comptroller of the currency ought to have such power, but rather whether he has such power under the law as it now reads and has read since 1864.

This question was first answered in the affirmative, June 28th, 1899, in *Aldrich v. Yates*, 95 Fed. Rep., 78, by Judge Evans of the Federal Court of Kentucky, and in the negative October 19th,

1899, in *Deweese v. Smith*, 97 Fed. Rep., 309, by Judge Philips of the Federal Court of Missouri in a well considered opinion, and again in the affirmative, June 23rd, 1900, in *Studebaker v. Perry, Receiver*, 102 Fed. Rep., 947, by the Circuit Court of Appeals for the seventh circuit, and again in the affirmative, February 25th, 1900, in *Deweese v. Smith*, 106 Fed. Rep., 438, by the Circuit Court of Appeals for the eighth circuit. This court has never passed upon the question here presented and could not have done so prior to these last mentioned decisions for the simple reason that no comptroller of the currency, until the year 1897 or 1898, ever claimed the right or ever attempted to make a second assessment as was made in this case.

The decisions in *Aldrich v. Yates* and *Studebaker v. Perry Receiver*, against our contention here, are due to an entire lack of conception or appreciation of the nature and character of a national bank shareholder's individual liability, and the decision in *Deweese v. Smith*, 106 Fed. Rep., 438, adverse to our contention here, is due to an entire misconception of such liability.

The correct answer to this question involves a consideration of the nature and character of a national bank shareholder's i ability and further a careful consideration of the language of sections 5151 and 5234, R. S. U. S., which create and fix such liability.

When the nature and character of such liability and the meaning of sections 5151 and 5234 are understood, a correct answer to the question here presented at once becomes easy.

## II.

## The Individual Liability of National Bank Shareholders is Contractual.

That the individual liability of national bank shareholders is contractual may now be regarded as settled by the decisions of this Court.

In *United States v. Knox*, 102 U. S., 424, this court said:

"By the common law the individual property of the stockholders was not liable for the debts of the corporation under any

circumstances. Here the liability exists by virtue of the statute and the assent of the corporators to its provisions, given by the contract which they entered into with congress in accepting the charter.

"With respect to the character of that liability, it is entirely clear from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, 'one for another,' as to the *amount* which each might be required to pay."

In *Richmond v. Irons*, 121 U. S., 55, this court said :

"Under that act" (meaning the national bank act) "the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising under these obligations and promises should not have the same force and effect and be as binding in all respects as any other contracts of the individual stockholders. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives."

Again, at page 48, it is said :

"Section 5151 imposes upon the shareholders of every national bank association an individual responsibility for all its contracts, debts and engagements, and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders."

In *Concord First National Bank v. Hawkins*, 174 U. S., 372, this Court, in speaking of the obligation of national bank shareholders, said :

"Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

To the same effect is *Whitman v. Bank*, 176 U. S., 559.

The individual liability of stockholders in corporations generally is a contract liability.

Cook on Corporations at section 223, says :

"The courts are nearly unanimous in holding that where by statute the stockholders in a corporation instead of being relieved entirely from liability to corporate creditors are only partially relieved therefrom, the additional liability is a contract liability and will be enforced by the courts of any state. In other words, the ordinary statutory liability of stockholders is a contract liability and is generally held to be such by the courts of all the states."

## III.

**The Contract of a National Bank Shareholder is that he Shall be Individually Responsible Equally and Ratably, for the Contracts, Debts and Engagements of such Bank to the Extent of the Amount of His Stock Therein and that if Necessary to Enforce Such Contract Liability to Pay the Debts of His Bank, he will Pay, on Demand of the Comptroller of the Currency the Par Value of his Stock. Such Contract Liability being Single and Indivisible, only one Assessment and Suit to Enforce the Same is Authorized by Law.**

(*a*) It being established by the decisions of this Court that the individual liability of shareholders of a national bank is one of contract, it now becomes important to ascertain and determine what their contract or agreement is. This must be done by looking to the words of sections 5151 and 5234, of the Revised Statutes of the United States, 1875, and the decisions of this Court construing them ; for it is those sections which create such contract liability and fix the terms thereof. Those sections are in words and figures as follows, to-wit :

"SECTION 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders in any banking association now existing under the state laws, having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the

comptroller of the currency, shall be liable only to the amount invested in their shares ; and such surplus of twenty per centum shall be kept undiminished and be in addition to the surplus provided for in this title ; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good ; and in case of such deficiency the comptroller of the currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this title.

SEC. 5234. On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the directions of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order may sell all the real estate and personal property of such association on such terms as the court shall direct ; and may, if neccessary, to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

Section 5151, *supra*, creates and fixes the liability and section 5234, *supra*, relates to the enforcement thereof.

These sections of the statute making national bank shareholders individually liable for the debts of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, being in derogation of the common law, must be strictly construed. *Cook on Corporations*, Vol. 1, Sec. 241 ; *Knox v. U. S.*, 102 U. S., 422.

In *Carroll et al. v. Green et al.* 92 U. S., 509, this Court having under consideration the individual liability of stockholders in corporations, in recognition of this rule of construction, said :

"Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature and not otherwise."

So, in *Lowry et al. v. Inman*, 46 N. Y., 119, the New York Court of Appeals, discussing the individual liability of stockholders, said:

"The operation and effect of the statute, or the liability of the stockholder, which is measured by it, cannot be extended by implication. There is no implied undertaking of the defendant as a stockholder of the bank; and there is no obligation resulting from that relation, other than such as is expressed in terms, or by necessary implication in the act of incorporation.

"The plaintiffs must bring the case within the four corners of that instrument or fail in their action."

What then is the contract liability of national bank shareholders, measured by the plain words of sections 5151 and 5234, not extended by implication? What is the plain meaning of the terms thereof?

Section 5151, R. S. U. S., is too plain for construction. The meaning of such section is clearly expressed by the words used therein.

The agreement or contract of the shareholders of every national banking association, in the language of section 5151 is that they "shall be held individually responsible, equally and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

Section 5234, R. S., U. S., has been construed by this Court. But without the aid of judicial construction that portion of section 5234, R. S., U. S., *supra*, material here, clearly means that "such receiver, under the directions of the comptroller * * * may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders," according to law. Whether by a suit at law, or in equity, or both, this section does not say. This Court, however, soon after the enactment of such section, construed its language to mean that such liability must be enforced by an action at law if such liability is sought to be enforced to its full extent, and by a proceeding in equity or at law if only a part of such liability is sought to be enforced. In the same case this Court held also that it was for the comptroller to decide when it is necessary to institute such proceedings, and whether a whole or a part, and if

only a part, how much of such liability shall be collected (*Kennedy v. Gibson*, 8 Wall, 498). So, we say, if the meaning given to section 5234, R. S., U. S., by this Court was written into said section, said section would read as follows:

"Such receiver, under the directions of the comptroller, * * * may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders" at such time and in such amount as he may decide, and by a proceeding at law if the whole of such liability is sought to be enforced, and by a proceeding in equity, or at law, if only a part of such liability is sought to be enforced.

That such was the construction placed on Section 5234, *supra* in *Kennedy v. Gibson*, 8 Wall, 498, where this Court first pointed out the obligations of national bank shareholders thereunder, is made certain by this language:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

"The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the

validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute, that any surplus which may remain after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants."

In *Casey v. Gali*, 94 U. S., 676, which was an action at law to enforce the liability of national bank shareholders to the full extent, the language used in *Kennedy v. Gibson*, *supra*, was fully approved.

In *National Bank v. Case*, 99 U. S., 628, which was a bill in equity, brought by Frank Case, receiver of the Cresent City Bank of New Orleans, against the stockholders of that institution to collect 70 per cent of the par value of the capital stock, owned by them, this Court said :

"Former decisions of this court have ruled that the determination of the comptroller of the currency is conclusive of the extent to which liability of stockholders of insolvent banks may be enforced in suits against such stockholders."

In *United States v. Knox*, 102 U. S., 422, this Court said :

"In the process to be pursued to fix the amount of the separate liability of each of the shareholders it is necessary to ascertain : 1. The whole amount of the par value of all the stock held by all the shareholders. 2 The amount of the deficit to be paid after exhausting all the assets of the bank. 3. Then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock."

In *Bushnell v. Leland*, 164 U. S., 684, which was an action at law to enforce the individual liability of a national bank share-

holder, this Court cited with approval *Kennedy v. Gibson ; Casey v. Gali, and United States v. Knox, supra.*

So it may now be regarded as settled by the decisions of this courts that the comptroller of the currency by the terms of Sections 5151 and 5234 must first decide as to the necessity of enforcing this individual liability ; the time when the same shall be enforced, whether *the whole or a part of such liability, and if only a part how much shall be collected ;* that this action on his part is indispensable whenever the individual liability of stockholders is sought to be enforced and must precede the institution of suit by the receiver ; that where the whole of such individual liability is to be enforced it must be enforced by an action at law and where a part thereof is to be enforced it may be enforced either by a proceeding at law or one in equity ; and that the decision of the comptroller is conclusive of the extent to which such liability may be enforced.

The comptroller is authorized by section 5234 to and he must decide on examination first whether it is necessary to enforce the stockholders' liability created and fixed by section 5151, that is, whether the assets of the insolvent bank are sufficient or insufficient to pay the debts of such bank ; and if insufficient, he must further decide when proceedings shall be instituted to enforce such contract liability, and, in the language of this Court in *Kennedy v. Gibson, supra*, "whether the whole, or a part, and if only a part, how much shall be collected." The comptroller's decision as to these matters being absolutely conclusive on shareholders, it follows that their agreement is to pay on demand of the comptroller the whole amount of their liability ; for they cannot question the amount demanded by him. It is true that the comptroller can demand less if he sees fit to do so, but he is under no obligation to do so any more than the holder of a demand promissory note for five thousand dollars is under obligation to demand less. The holder of such note can demand less, but it is wholly optional with him. So can the comptroller, but it is wholly optional with him too.

It is usually provided in the articles of association of corporations, or in statutes, or in stock subscription contracts that the capital stock of such corporations shall be payable in installments on call, or on demand. In such cases the agreement, or undertaking of the stockholders, is to pay their subscriptions in

installments and the authorities are agreed that the amount of such subscriptions can be collected in installments. Where, however, there is no such provision as to payment of stock subscriptions the authorities are not agreed in holding that the stockholders impliedly promise to pay the capital stock in installments on call of the board of directors. Cook on Corporation, Section 105. In New York the rule is that corporation stock subscriptions are payable absolutely and at once or as soon as the corporation is duly organized, unless the subscription contract provides for installments and calls. Cook on Corporation, Section 107; *Lake Ontario Railroad v. Mason*, 16 N. Y., 451; *Phoenix Warehousing Company v. Badger*, 67 N. Y., 294.

The authorities are agreed that stockholders are individually liable by and only the plain terms of the statute creating such liability and that their liability cannot be extended by implication. In case of individual liability of stockholders there is no implied undertaking on their part and there is no obligation resulting from that relation, other than such as is expressed in terms. *Carroll et al. v. Green et al.*, 92 U. S., 509; *Lowry v. Inman*, 46 N. Y., 119.

There being no implied promise or undertaking on the part of national bank shareholders to discharge their individual liability in installments, it can not be said that their contract is to pay such liability at such times and in such amounts as the comptroller shall fix.

Section 5234, *supra*, does not say that the receiver, under the direction of the comptroller, *can enforce only so much of the liability created by section 5151 as may be necessary to pay the debts of such bank.* It says that the *receiver, under the directions of the comptroller, may, if necessary to pay the debts of such bank, enforce the stockholders' liability created by section 5151.*

If it be necessary to enforce such liability to any extent to pay the debts of such bank, the comptroller can enforce it to its full extent, returning any surplus collected to the shareholders. And this must be so, for the reason that such shareholders have obligated themselves to pay such amount.

Section 5236 of the Revised Statutes of the United States provides that any surplus of the amount collected from the shareholders to pay the debts of such association which may

remain after satisfying all demands against such association shall be paid over to the stockholders. The enactment of this section, which follows sections 5151 and 5234, is a clear recognition of the right of the comptroller to enforce such liability to the full extent; and clearly sustains our contention that the comptroller may enforce the individual liability of the stockholders to its full extent.

In *O'Connor v. Witherby*, 111 Cal., 523 it was held that the comptroller of the currency had the right to collect the full amount of the individual liability of national bank shareholders in the event it became necessary to resort to such liability to pay such bank's debts.

This Court so construed these sections in *Kennedy v. Gibson*, *supra*, for there it was said:

"A speedy adjustment is necessary to the efficiency and utility of the law; the interests of creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than the evils of delay should be encountered."

If the comptroller is authorized by these sections to collect more of such individual liability than is needed to pay the debts of such insolvent bank, it follows, as a matter of course, that he is authorized by these sections to collect the whole of such liability. In other words, he is authorized to enforce such liability to its full extent, if it be necessary to resort to it to pay the debts of such bank. If the assets be insufficient, in the judgment of the comptroller, to pay the debts of such bank, he can demand at once the whole amount of such individual liability and enforce the payment thereof by suit. As soon as he decides the assets are insufficient to pay such bank's debts, he has a right of action for the full amount of such liability or so much thereof as he may elect to collect.

So the agreement of national bank shareholders is to be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount invested in such shares, and that if necessaay to pay the debts of such bank they will pay the

whole of such liability or such part thereof as the comptroller of the currency shall demand. Such is the contract deducible from the statute itself and the decisions of this Court. Their contract is not, as claimed by the Circuit Court of Appeals for the eighth circuit in *Deweese v. Smith*, 106 Fed. Rep., 438, that they shall be held individually responsible, equally and ratably, and not one for another for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares and that they "*will pay, at such time and in such amounts, as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of their bank.*"

Said Circuit Court of Appeals without any warrant of law reads into said sections the words in italics and in so doing, as might be expected, misconstrues said sections and gives to them an unwarranted meaning.

The authorities nowhere justify the reading into section 5234 *supra* the words "at such times and in such amounts as the comptroller of the currency shall decide to be necessary," so as to make said section 5234 read as follows:

"Such receiver, under the directions of the comptroller, * * * , may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders at such times and in such amounts as the comptroller of the currency shall decide to be necessary."

The reading of such words into said section is clearly in violation of the rule laid down in *Carroll et al. v. Green et al.*, 92 U. S., 509, that stockholders of a corporation are individually liable according to the plain meaning of the terms employed by the legislature and not otherwise, and that the operation and effect of the statute or the liability of the stockholder, which is measured by it, cannot be extended by implication. *Lowry et al. v. Inman*, 46 N. Y., 119.

Section 5140 R. S., U. S. makes the stock subscription contracts of national bank shareholders payable in installments.

The agreement of national bank shareholders as to payment of the capital stock of their bank by the terms of that section is to pay at least fifty per cent. of the capital stock thereof before commencing business, and the remainder of the capital stock of such bank in installments of at least ten per centum each on the

whole amount of the capital as frequently as one installment, at the end of each succeeding month, from the time such bank shall be authorized, by the comptroller of the currency, to commence business. Section 5140 U. S., R. S. The stockholder's stock subscription contract being payable in installments it can be collected in installments.

The National Banking Act nowhere authorizes the comptroller of the currency to collect the individual liability of national bank shareholders in installments. So in the absence of such authority it cannot be said that national bank shareholders agree to be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount invested in their shares, at the par value thereof, in addition to the amount invested in such shares and to discharge such responsibility if necessary to pay the debts of such bank at such times as the comptroller of the currency shall name and in such amounts as he shall demand. In other words, the agreement of national bank shareholders is not to discharge their individual liability to pay the debts of their bank in installments on demand of the comptroller.

(*b*) Since the decision in *Kennedy v. Gibson*, *supra*, this Court has understood that the liability of national bank shareholders is one of contract; that such liability is single and indivisible; and that but one assessment, by the comptroller of the currency, to enforce such contract liability, is authorized and but one suit. That this Court entertained such views is clearly shown by the language used therein.

This language was used in that case:

"A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than the evils of delay should be encountered."

Why a question of delay, if innumerable assessments could be made? Why any reason for an over-assessment if assessments

can be made from time to time as the necessity for the same becomes apparent? Again, in that case it is said:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only part, how much shall be collected."

The idea conveyed by this language is that these sections authorize the comptroller to make one call or demand, either for the whole of the individual liability of the stockholders or so much thereof as the comptroller shall deem sufficient to pay the bank debts, and if too much be collected the excess should be refunded, and the various comptrollers evidently accepted that as the meaning of the court; for they adopted that practice uniformly until within the last two or three years. No one would understand that the language of that opinion sanctions the very recent contention that the number of suits to enforce the contractual liability of the shareholders is limited only by the discretion of the comptroller.

In 2nd Morawetz on Private Corporations, second edition, at section 882, the learned author, in discussing the liability of shareholders in national banks, says:

"The Act of Congress of 1864 provides that the shareholders in a national bank shall be 'individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.' When a national bank is insolvent, the extent to which the individual liability of the share holders shall be enforced is fixed by the order of the comptroller of the currency, and such order is conclusive upon the shareholders. If the order is to collect an amount equal to the full par value of the shares, the receiver of the bank must sue each share holder at law for the amount, together with interest from the date of the order."

Cook on Corporations at Section 218 says:

"The double liability of stockholders in national banks is fixed by an order of the comptroller of the currency, and under the national bank act the comptroller of the currency has absolute authority to direct at what time and to what extent the stockholder's statutory liability shall be enforced."

This language clearly implies that the comptroller is authorized to make but one order fixing the individual liability of a national bank shareholder.

(*c*) By the decisions of both federal and state courts it is well settled law that a single contract liability cannot be divided so as to support two actions. If a party has a demand against another he must enforce it in one suit. He cannot sue to recover a part of it and later the remainder. In other words, if a party has a cause of action, he must litigate it and conclude it in one suit. Such is the rule of the common law.

In *Baird v. United States*, 96 U. S., 430, this Court said :

"It is well settled that where a party bringing an action for part only of an entire indivisible demand recovers judgment, he cannot subsequently maintain an action for another part of the same demand. *Warren v. Comings*, 6 Cush., 103. Thus, if there are several sums due under one contract and a suit is brought for a part only, a judgment in that suit will be a bar to another action for the recovery of the residue. Here was a contract by which the government was bound to pay for the engines in accordance with the terms agreed upon. The entire price to be paid was not fixed ; a part was contingent and the amount made to depend upon a variety of circumstances. When the former action was commenced in the court of claims, the whole was due ; although different elements entered into the account, they all depended upon and were embraced in one contract. The judgment, therefore, for the part sued upon is a bar to its action for the residue."

Again, in *Hennequin v. Barney*, 24 Fed. Rep., at p. 582, Judge Wallace said :

"In *Bartelle v. Sehell*, 16 Fed. Rep., 341, it was held by the court that a plaintiff cannot split up a single and entire cause of action and make it the subject of different suits, and that in cases like this the liquidation upon each entry was the foundation of a single and entire cause of action against the collector. Following that decision, the referee correctly ruled that when the plaintiffs brought their action and recovered judgment for a part only of an entire and indivisible demand they estopped themselves from subsequently bringing another action for another part of the same demand."

The rule against splitting of demands is a legal right of defendants.

*Lawrence v. United States*, 8 Ct. of Claims, 252 ;
*Grain v. Aldrich*, 38 Cal. 514.

This rule is not a technicality, it is a wholesome rule of justice.

In *United States v. Throckmorton*, 98 U. S., 665, this Court had this to say of this well settled principle of law :

"There are no maxims of law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy : *interest rei publicaeut sit finis litium and nemo debet bis vexari pro una et eadem causa.*"

The distinction between demands or rights of action which are single and entire and those which are several and distinct is that the former immediately arise out of one and the same act or contract, and the latter out of different acts and contracts. *Secor v. Sturgis*, 16 N. Y., 548.

In *Secor v. Sturgis*, 16 N. Y. 558, it is said :

"In the case of torts, each trespass or conversion or fraud, gives a right of action, and not a single one, however numerous the items of wrong or damage may be ; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception ; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of the action is the stipulation which is in the nature of a second contract."

This principle has been applied in respect to the foreclosure of mortgages ; and it has been held that where a party having a mortgage upon a tract of land, proceeds to foreclose it as to a portion of the tract, it is a waiver of the lien of the mortgage as to the rest of the tract, and he cannot foreclose it as to such residue in a second suit. *Mascarel v. Raffor*, 51 Cal., 242.

In like manner it has been held that where a vendor having a lien for purchase money enforces it as to a portion of the land (*Day v. Preskett*, 40 Ala., 624,) or as to that portion of the money which is due (*Codwise v. Taylor*, 4 Sneed, 346), he thereby exhausts his remedy as to the rest of the land or as to the portion of the purchase money which is not due.

Is the rule in regard to the enforcement of this contractual liability of national bank shareholders different from that in regard to the enforcement of contractual liabilities generally? If so, we ask why? The National Banking Act nowhere expressly provides a different rule.

There is always a presumption against an intent to change the existing law. Black's Interpretation of Laws, Sec. 52.

In Robinson's case, 131 Mass., 376, it was said that the legislature is not to be lightly presumed to have introduced a fundamental change in long established principles of law. See also *Manuel v. Manuel*, 13 O. St., 458.

No special remedy being provided by statute for the enforcement of the individual liability of national bank shareholders, the enforcement thereof is governed by established principles of law. *Pollard v. Bailey*, 20 Wall, 520.

In the absence of words, plainly authorizing the receiver, under the direction of the comptroller, to enforce the contract liability of shareholders of a national bank, by several actions or suits, at such times and in such amounts as the comptroller may decide, how, with what reason and upon what principle of law, can it be said that "the contract of shareholders of a national bank is to discharge their liability for its debts, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall appoint" as held by the Circuit Court of Appeals for the Eighth Circuit?

*(d)* Section 5234 authorizes the enforcement of this contractural liability by suit. The comptroller may, at any time he deems it necessary for the payment of the debts of the association, direct the enforcement of this liability. He has the right to demand payment of an amount equal to the entire par value of the stock. The engagement of the shareholder is to pay that amount if demanded. This liability constitutes a single and indivisible cause of action.

The case of *Harper v. Carroll*, 66 Minn., 487, was a suit to enforce the individual liability of a stockholder under the Minnesota statutes. Section 2501, G. S. 1894, of that State, provides as follows:

"The stockholders in such bank shall be individually liable for an amount equal to double the amount of stock owned by

them for all the debts of such bank; and such individual liability shall continue for one year after the transfer of stock by the stockholder or stockholders."

The proper method of procedure under that statute was considered by the supreme court of that state, and the court there said:

"*They (referring to creditors) are entitled to collect the full balance of their claims, even though it exhausts the statutory double liability of every stockholder to its full limit. Who can say in advance that it will not exhaust such liability to its full limit, and in what other way can this be determined except by the issue of execution? Then one or two propositions must be true. First, the creditors are entitled to successive judgments for successive assessments until the full limit of such statutory liability is exhausted, if such successive assessments and judgments are made necessary by reason of the insolvency of the stockholders; or second, the creditors are entitled to one judgment for the full amount of such statutory liability. We are of the opinion that the latter is the proper method of procedure, and that but one judgment should be rendered, which should cover the utmost possible liability of such stockholder to the creditors.*"

The court held that the proceedings should be in equity, and that execution should be issued subject to the control of the court as necessary; and that successive suits would be improper.

In the matter of The Hollister Bank of Buffalo, 27 N. Y., 393, the question was whether a second assessment was authorized by the act of April 5th, 1849, enacted by the legislature of New York,—the first section of which made stockholders of banking associations individually responsible, equally and ratably, for certain debts to the extent of their respective shares of stock in such association. The court, in holding that a second assessment was not authorized, said *inter alia:*

"Subsequent sections of the act provide for the appointment of a receiver, in case of the insolvency of any banking corporation; for the conversion of its assets into cash; for the payment, in the first place, if necessary, of the bills or billholders; and for a dividend of the surplus, if any, first among the creditors holding debts founded on any liability contracted after the 1st of January, 1850, and if any further surplus remains, then among all other creditors.

"The 14th section provides that if, after the declaration of the first dividend, there shall remain unsatisfied any debts of such corporation or association, contracted since January 1st, 1850, the receiver, without waiting for the payment of such dividend, shall render to a justice of the Supreme Court an account of such debts, and of all his proceedings, together with a list of the stockholders. The matter is then to be referred to a referee, who, after notice to the parties, is to 'apportion the debts of such corporation, contracted after January 1st, 1850, and remaining unsatisfied, among the said stockholders ratably in proportion to their stock,' according to the principles of the act, and to make a report to the court. This report is to be examined by the court. It may be modified, or amended, or referred back. After the report is confirmed, it is to be filed in the office of a county clerk, with the *order* of confirmation, and such order is to be a judgment against each stockholder for the amount assessed, chargeable to him. Provision is made for appeals from orders in such proceedings, and for a new apportionment in case it becomes necessary by reason of the determination upon any such appeal. The money collected upon an apportionment or assessment is to be divided among the creditors, and if any surplus remains after paying the debts, it is to be paid to the stockholders who were assessed, in proportion to the amounts levied upon them.

"The act contains a complete and well digested system for one assessment, without any provision for a second. The contingency of the failure, or inability of a portion of the stockholders to respond to the assessment, although it could hardly have escaped the consideration of the legislature, is not provided for in any way. The apportionment of the debts among the stockholders is directed to be made ratably in proportion to their stock, and a new apportionment or assessment, if made under the direction of the statute, is to correct errors in the first, and not to supply a deficiency in its results. * * *

"As the responsibility of each stockholder is several, the effect of this language is to make each liable for his equal ratable proportion of the debt. The effect of the act may be seen by supposing that all the stockholders of this bank had signed a bond or undertaking to any or all of the creditors by which they severally agreed to be responsible, equally and ratably, in proportion to the amount of their stock, for the debts due by the association, to such creditors. It is, I think, sufficiently plain that such an obligation or agreement would impose upon each of the parties to it a responsibility for a proportionate share of the debts. * *

"This apportionment of liability by the referee, upon the principle of proportion to the stock, when confirmed by the court, becomes the judgment, declaring and enforcing the liability created by the act. There is but one such apportionment and

consequent judgment against each stockholder provided for, and but one contemplated by the act. * * * *

"The act contains no authority for a second assessment or a second application, and I discover no provisions in the law from which it could be inferred that any such subsequent assessment to make good deficiencies in the collection of the first, was contemplated by the framers of the act. * * * *

"Upon the whole, I am of opinion that the liability imposed by this statute upon the stockholders of banking associations, is a several liability for a ratable and equal share of the debts, in proportion to the whole debts and the whole capital stock, and not a liability to each creditor until he is paid, limited only by the amount of stock held by the stockholder, and that the statute gives no authority or jurisdiction to make more than one judgment, the first apportionment and judgment remaining unreversed."

The individual liability, created by the said act of 1849, was substantially the same as that created by sections 5151 R. S., U. S. The extent of that liability was the par value of the stock. Said act of 1849 provided a special remedy for the enforcement of such individual liability, whereas said section 5234, *supra*, provides that such individual liability should be enforced according to law.

The liability created by the act of 1849 was enforceable according to the principles of the act itself, while that created by sections 5151 is enforceable according to general principles of law.

In *Smith v. Huckabee*, 53 Ala. 191, the liability of a shareholder to creditors under statutes of that state was considered. The court said :

"When the legislature imposed on the members of a corporation in the event of dissolution, a personal liability for corporate debts to the extent of their stock, it was a mere increase of security for such debts. It was not intended to exempt from or diminish the liability of the fund which a court of equity regarded as pledged to the payment of corporate debts. To this fund was super-added the personal liability of the members and whatever should be realized therefrom."

The court further says :

"The liability is single, distinct in amount. Can it be split up into as many several causes of action as there may be creditors? That an entire or single cause of action may not be divided or split into several, is an elementary principle."

To hold that the comptroller of the currency may make several assessments and maintain several suits to enforce the individual liability of national bank stockholders, is to hold that the contractual liability of such shareholders may be split and enforced by several assessments and suits, when the National Banking Act nowhere authorizes the splitting of this liability. This is what defendant in error is asking this Court to decide, and is what this Court must decide if this judgment be affirmed. This, we say, cannot be done, and on the well settled principle of law that if a party has a demand or legal obligation to enforce against another party arising *ex contractu*, he cannot split such demand or cause of action, unless authorized by statute to do so. As said in *Hamilton v. Jones*, 125 Ind., 178 :

"Statutes in derogation of the common law are to be strictly construed, and one who seeks to maintain an action, which was within the prohibition of the common law, must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by statute must present a case clearly within the statute which creates the right.

(e) It is no answer to our contention to say that the comptroller of the currency may not be able to determine to what extent it is necessary to enforce this personal liability unless he waits until he realizes on the assets of such insolvent bank, and that he ought not to have to wait until that time, as some of the shareholders may become insolvent. If the comptroller is in doubt as to the amount to be collected, let him enforce this liability to the full extent thereof, and refund the balance of the proceeds, if any, to the shareholders, as authorized by statute. Congress fully understood that the comptroller might collect too much, as shown by the enactment of section 5236. If, for any cause, the comptroller of the currency cannot determine the amount to be collected and does not wish to enforce the liability of the shareholders to its full extent, let him proceed in equity, as suggested in *Kennedy v. Gibson*, *supra*, and take interlocutory decrees for contribution from time to time until he realizes enough to pay the debts of such insolvent bank, or until the full amount of such liability is exhausted. It is no answer, therefore, to say that the comptroller may be mistaken as to the amount needed to pay the debts of the insolvent

bank. There is no occasion for such mistake. Let him, if in doubt, either collect the full amount of such liability in an action at law, or proceed in equity. The shareholders cannot complain; for their contract is to pay the par value of their stock on demand of the comptroller.

Where the individual liability of shareholders is enforced in a court of equity, such court has full power to collect such liability by installments, entering a decree *nisi* with time for each shareholder to pay the sum assessed. If the amount collected is insufficient and the liability of such shareholders is not exhausted, such court has full power to make other assessments until the full amount of such liability is exhausted. *Kennedy v. Gibson*, 8 Wall, 498; *Godfrey v. Terry*, 97 U. S., 177.

In 2nd Morawetz on Private Corporations, second edition, at section 902, it is said:

"Where the liability of the shareholders is imposed for the purpose of providing a general fund for the security of creditors, in addition to the company's capital, the proper method of proceeding seems to be to have a receiver appointed to take charge of the fund belonging to the creditors and distribute it ratably among them. The court should properly apportion the liability among the various shareholders within its jurisdiction. A decree *nisi* may be made that each defendant pay the sum assessed against him within a specified time, and that execution issue against those defendants who fail to comply with the decree. If execution against a portion of the defendants should be returned *nulla bona*, a further assessment should be made, until the liability of the defendants has been exhausted, or the plaintiffs have been paid."

A court of equity in a proceeding to enforce the individual liability of national bank shareholders, has power to make successive assessments, and will do so at request of a receiver under direction of the comptroller.

This Court, in *Kennedy v. Gibson*, *supra*, said:

"Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted."

See also on this point the language of Judge Philips in *Deweese v. Smith et al.*, 97 Fed. Rep., 309.

(*f*) Sections 5151 and 5234, *supra*, were enacted in the interest of the creditors of national banks to furnish them additional security. This being so, it was certainly the intention of Congress that there should be a decision or determination by the comptroller at as early a date as practicable as to the necessity of enforcing such liability and as to the extent to which it should be enforced to the end that the creditors might be paid without unnecessary delay and not sustain loss which might result from delay in enforcing such liability. And as if to protect such creditors to the fullest possible extent in these respects, the comptroller was authorized to enforce such individual liability to its full extent, if it became necessary to enforce such liability to pay the debts of such bank. To authorize the comptroller of the currency to enforce such liability to its full extent, he simply has to decide that the assets of such bank are insufficient to pay its debts, contracts and obligations. In determining that it is necessary to enforce such liability to pay such debts, he is not required, by these sections or the decisions of this Court, to further determine the exact amount necessary to pay them. If he were, there was no occasion for the enactment of Section 5236.

So, we confidently submit that the obligation of national bank shareholders is to pay the par value of their stock on demand of the comproller, if the assets of their bank are insufficient to pay its debts, contracts and obligations, no matter how little the deficiency may be. Such a construction of these sections affords the creditors of such bank the fullest protection, such as was the manifest intention of Congress to give them, and such construction is perfectly consistent with the rules of construction hereinbefore invoked by us.

It has been suggested that the enforcement to the full extent of this individual liability of national bank shareholders, or to a greater extent than thought to be necessary by the comptroller, would be a hardship on such shareholders. A sufficient answer to this suggestion is that Congress was looking after the interests of national bank creditors when these sections were enacted into law, and not those of shareholders.

(*g*) The term "assessment" is nowhere used in this statute.

The terms, "calls and assessments" are sometimes used indiscriminately. The term "assessment" strictly applies only to amounts levied beyond the par value of stock. The rule is now general that corporations have no implied power to make such levies, and even when the power is expressly conferred it will receive a strict construction. Am. & Eng. Encyp. of Law, Vol. 23, p. 817; Morawitz on Corporations, Sec. 131.

In 2nd Beach's Private Corporations at section 590, it is said:

"The word 'assessment,' when used in reference to members of companies having capital stock, more properly refers to amounts levied upon shareholders after their subscriptions have been fully paid. The power to levy assessments, using the word in this, its proper sense, is wholly statutory, and will not be lightly inferred from the language of a statute or charter."

In support of this text are cited Price's Appeal, 106 Pa. St., 421; *Upton v. Tribilcock*, 91 U. S. 45; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466.

In 23 Am. & Eng. Encyp. of Law, p. 803, it is said:

"The terms 'calls and assessments' are often used indiscriminately to denote the exercise by the corporation of its right to declare due and to collect subscriptions or a part thereof. The word 'calls,' however, has other meanings; while the term 'assessment' is said to refer more properly to 'amounts levied upon shareholders after their subscriptions have been fully paid.'"

The power to levy or make assessments upon stockholders after their subscriptions are fully paid, we have seen is wholly statutory, and when conferred by statute, such statute is strictly construed.

Section 5234, *supra*, simply authorizes the comptroller to enforce the individual liability of shareholders of a national bank, if necessary to pay the debts of such bank. The comptroller is therefore plainly authorized to decide as to the necessity of enforcing such liability and as to the time when the same is to be enforced, and fix the amount to be collected. In short, there is to be a decision by the comptroller as to these matters and then a demand or requisition by him followed by one suit at law or in equity as circumstances require. It is this decision which has been termed an assessment. The comptroller is nowhere ex-

pressly authorized to enforce such liability by several decisions and suits. He is simply authorized to enforce the individual liability of national bank stockholders according to law, which means the application of the appropriate remedy according to the course of legal procedure. If this statute authorizes but one suit or proceeding to enforce this liability, as we contend, it follows as night the day that there can be but one decision by the comptroller as to the time, necessity and extent of enforcing this individual liability, and, therefore, but one assessment, as this statute certainly does not authorize an assessment which could not be enforced by suit.

## IV.

## For Thirty-three Years Comptrollers of the Currency Charged with the Execution of Sections 5151 and 5234 R. S., U. S., Construed these Sections to Authorize But One Assessment.

The comptrollers of the currency for thirty-three years understood that Sections 5151 and 5234, *supra*, authorized them to make but one assessment.

If these sections do not plainly authorize several assessments or decisions by the comptroller, we submit the construction placed thereon by the comptrollers of the currency for the last thirty years, and acquiesced in for the same length of time by Congress and acted upon by national bank shareholders, should not now be disturbed. To justify this Court in setting aside this practical construction of these sections, it should be convinced by most cogent and persuasive reasons that such practical construction is *clearly erroneous.*

The report of the comptroller of the currency for 1898, at p. XXXVI of Vol. 1, reads as follows:

"The practice of this office heretofore has been when an assessment on stockholders is once decided upon as the proper one to cover a deficiency in the assets of an insolvent bank and to

reimburse depositors, to regard such levy as irrevocable and unchangeable, notwithstanding further developments in the administration of a trust, may demonstrate error in the assessment."

And this Court in making up its opinion of the law of this case will take notice of this statement.

In *Davidson v. Gibbon*, 56 Fed. Rep., 446, the Circuit Court of Appeals, per CALDWELL, J., said:

"The court in making up its opinion of the law on the case is not limited in its researches to legal literature. It may consult works on collateral sciences or art or history touching the topic on trial, and may appeal to the public archives for this purpose. *Wheat, on Evidence*, Sections 282 336; *Brown v. Piper*, 91 U. S., 42; *U. S. v. Teachmaker*, 22 How., 392; *Kirby v. Lewis*, 39 Fed. Rep., 66."

In *Black on Interpretation of Laws*, p. 217, it is said:

"The existence and nature of such a usage is a matter of law. The court will take judicial notice thereof or will inform itself by any proper and available means. Interested parties are neither required nor permitted to prove it as a fact."

Another principle of construction in view of this practice, to be here invoked in arriving at the true meaning of Sections 5151 and 5234, is the practical construction put thereon soon after enactment. This construction, after the lapse of time without change thereof by legislation or judicial decision, has been declared by the courts to be generally the best construction.

As said by Chief Justice MARSHALL, in *Cohens v. Virginia*, 6 Wheaton, 418:

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition."

In *United States v. Moore*, 95 U. S., 760, the court said:

"The construction given to the statute by those charged with the duty of executing it ought not to be overruled without cogent reasons."

In *U. S. v. Johnston*, 124 U. S., p. 253, the court said:

"In view of the foregoing facts the case comes fairly within the rule often announced by this court that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight

and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In *U. S. v. Philbrick*, 120 U. S., at p. 59, it is said :

"A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight, and since it is not clear that that construction was erroneous, it ought not to be overruled."

These sections were enacted in 1864, and the comptrollers of the currency for thirty-three years, some of whom were eminent lawyers, have held without exception that there could be but one assessment on the shareholders of an insolvent bank to pay the debts of such bank. Can it be that all of these comptrollers have misconstrued these sections? Is the judgment of the comptroller, who made the assessment in question, as to the meaning of the law better than that of all his predecessors in office and the legal advisers of the United States by whom the comptrollers of the currency were evidently advised and upon whose advice they acted? Congress has been in session time and again since these sections were first interpreted by those whose duty it was to execute the provisions thereof, and Congress has taken no action to amend these sections so as to authorize a second assessment on the shareholders of an insolvent national bank. On the contrary, Congress has acquiesced in the construction placed on these sections by the comptrollers of the currency for the last thirty-three years. The action of the present comptroller in making the assessment on which suit is brought against this defendant seems unwarranted to say the least, in view of the plain meaning of these sections and in view of the practical construction of all his predecessors in office and the long acquiescence of Congress therein.

Can this Court imagine a single cogent and persuasive reason why the practical construction placed on these sections of this statute and so long acquiesced in by Congress should be disturbed at this late date? These sections, as construed by this Court in *Kennedy v. Gibson*, *supra*, give the comptroller of the currency ample power to protect the interests of creditors of national banks in whose interests they were enacted.

We therefore submit that the construction placed upon these sections for the last thirty-three years is right and should not be

disturbed or overruled by the courts at this late day. In the language of this Court in *Robertson v. Downing*, 127 U. S., 613:

"This construction of the department has been followed for many years, without any attempt of Congress to change it, and without any attempt, so far as we are advised, of any department of the government to question the construction except in the present instance. The regulations of a department of the government is not, of course, to control the construction of an act of Congress when its meaning is plain, but when there has been a long acquiesence in a regulation, and by it rights of third parties, for many years, have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

## V.

## Recent Decisions on Question Here Presented for Decision.

The question under discussion here was first presented in *Aldrich v. Yates*, 97 Fed. Rep., 78, where Judge Evans of the United States Circuit Court for the district of Kentucky, on June 28, 1899, held that the comptroller of the currency was authorized to make successive assessments on national bank shareholders. This decision bears evidence of being hastily considered and is supported by neither reason nor authority. In deciding the question which this record presents he said:

"The question, then, remains, has the comptroller of the currency the power to make a second assessment in any event? The ultimate liability of the shareholder in such cases is for the full amount of the par value of the stock (section 5151), under the statutory conditions, if they are found by the comptroller to exist. A mistake of that officer in making an estimate of the amount of a needed assessment cannot be held to release the shareholder from the full statutory liability. A mistake of such a character would be natural, if not inevitable, in many instances, in view of the uncertain value of assets; and the indisposition in the first instance to make an assessment unnecessarily large may well excuse its not being done, when there is certainly no statutory provision prohibiting, in terms or by necessary implication, further assessments, if the necessity exists. In practice, second assessments have frequently been made. The court is of opinion that such a course is within the power of the comptroller,

in the exercise of his duty to see that the liability of the stockholder is sufficiently enforced to pay the debts of the bank, and that practice has been recognized as proper by the Supreme Court. See *U. S. v. Knox*, 102 U. S., 422."

Judge Evans, it will be observed, states that in practice two assessments have frequently been made. Just the contrary of this statement, we have seen, is true and the practice in this regard we have just seen is an all important consideration in a decision of this case. It will also be noticed that the contentions here made seem never to have been urged or considered by Judge Evans in his opinion. Judge Evans completely overlooked the principles of law applicable in a decision in that case and reached the conclusion he did, partly at least, upon the assumption of the existence of a fact which did not exist. For these reasons we think we are justified in saying that the Evans' opinion is not well considered.

The next case in which this question was presented is *Deweese v. Smith*, 97 Fed. Rep. 309, decided October 19, 1899, by the United States Circuit Court for the Western District of Missouri. There the power of the comptroller of the currency to make successive assessments was denied in a well considered opinion. By a reading thereof it will be seen that it is carefully considered and supported by both reason and authorty and is characterized by that regard for well settled principles of law which should characterize every opinion of a court.

In *Studebaker v. Perry, Receiver, supra*, the Circuit Court of Appeals for the seventh Circuit did not attempt to meet and dispose of the contentions here made, but dogmatically held that the comptroller of the currency was authorized by law to make successive assessments and expressed its reasons therefor in this language :

"Indeed, the contention here is that merely by making one assessment for less than the entire amount of the stock the comptroller deprives himself of the power to make another, and that no more than one assessment can be collected, unless the shareholders shall refuse to pay the first, and the receiver shall choose to proceed in equity to collect it, and so give the court opportunity to hold the case 'for further action.' See also *Bank v. Case*, 131 U. S. Append. cxliv., 23 L. Ed. 961. The dominant purpose of the parts of the statute touching this ques-

tion is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the comptroller the receiver is authorized to enforce the shareholder's liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design. In the case of *Aldrich v. Campbell*, 38 C., C. A. 347, 97 Fed. 663, the suit was to enforce a second assessment, the first having been fully paid, and the power of the comptroller to make successive assessments, though not denied, was considered and affirmed. In *Aldrich v. Yates*, (C. C.), 95 Fed., 78, the power, though denied, was affirmed by the circuit court for the district of Kentucky, and like rulings in unreported cases have been made at circuit in Indiana and elsewhere.

"If the statute were one whose meaning could be sought in contemporary construction, there is nothing in the practice of the comptrollers to affect our conclusion. The comptrollers have had the power to make assessments, either for the entire amount of stock or less, and the evidence is abundant in the reported cases of the exercise of the power in both ways. Of the effect of proceeding in one way or the other, the question was not, and in the nature of things, could not have been, for their decision, and it does not appear that any of them ever assumed to decide it. The judgment is affirmed."

The statement that the evidence is abundant in the reported cases of the comptrollers of the currency making successive assessments is certainly inaccurate, if not reckless; for in the report of the comptroller of the currency for 1898, at page XXXVI of Vol. 1, we find this language:

"The practice of this office heretofore has been when an assessment on stockholders is once decided upon as the proper one to cover a deficiency in the assets of an insolvent bank and to reimburse the depositors, to regard such levy as irrevocable and unchangeable, notwithstanding further developments in the administration of the trust, may demonstrate error in the assessments."

In *Dewecse v Smith*, 106 Fed. Rep., 438, the Circuit Court of Appeals for the eighth circuit met and disposed of each contention here made, against us, but to do so to its satisfaction that court was forced to place a construction upon Sections 5151 and 5234, *supra*, which, in our judgment, was unwarranted, and which we believe we have demonstrated to be so. If the con-

struction, placed upon those sections by that court is correct, its decision may be sound. That court, in the course of its opinion, said :

"The agreement of the shareholder with the bank and its creditors thus becomes a contract that to an amount not exceeding the par value of his shares of stock and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of his bank."

And later, in the opinion, said :

"The contract of the shareholders of a national bank is to discharge their liability for its debts at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall appoint."

To successfully dispose of our contention against successive assessments it was necessary to place just such a construction on those sections as that court did.

As no two of the decisions holding that the comptroller of the currency is authorized to make successive assessments agree as to the reasons given in support thereof, the correctness of such decisions may well be questioned.

Defendant in error in the lower courts relied on *Aldrich v. Campbell*, 97 Fed., 663. Upon examination it will be found that the point presented by this record and here discussed was in no way involved or controverted in that case.

The facts in *Aldrich v. Campbell*, were these :

J. Frank Aldrich, receiver of the Tacoma National Bank, commenced an action at law to recover of Louis D. Campbell, a shareholder of said bank, a second assessment of $17.00 per share on his shares of stock in said bank. Thereupon, Campbell brought a bill in equity to enjoin Receiver Aldrich from further prosecuting said action at law, stating the pendency of said action at law, and alleging that the total indebtedness of said bank at the time it suspended payment did not exceed $222,362.34 ; that the total amount collected by the receiver from the assets of said bank was $139,000.00 ; that the total amount of the assessment levied by the comptroller of the currency on the shareholders was $130,000.00 ; and that the sum of these two amounts, $269,000.00,

was at least $46,637.66 in excess of the total indebtedness of said bank at the time it suspended payment, and largely in excess of said indebtedness, plus the interest thereon, to the time of the first assessment of August 6th, 1895.

He further alleged that he was debarred from interposing these facts as a defense to the action at law, and could not obtain full and complete justice in said action; that the comptroller of the currency, by said assessment of August 6th, 1895, had collected from said Campbell $1,500 in excess of the amount lawfully assessable against him as a stockholder in said bank; wherefore he prayed that said comptroller and receiver be decreed to repay him the sum of $1,500 and be enjoined from further prosecuting the said action at law. Receiver Aldrich, of said bank, demurred to the bill on the ground of want of jurisdiction, for the reason that the amount in controversy was less than two thousand dollars; and on the further ground that the complainant had not in and by his bill stated such a cause as entitled him in a court of equity to any discovery from the respondent, or to any relief against him as to any of the matters contained therein. The trial court overruled the demurrer and entered an interlocutory order restraining said receiver until the hearing and determination of said cause before proceeding further against said Campbell in the action at law, pending in said court. And it was from those orders an appeal was taken to the Circuit Court of Appeals.

The court, after disposing of the jurisdictional question raised in that case, said:

"The real controversy in the case at bar arises, however, on the second ground of demurrer, which presents this question: Does the bill state facts entitling complainants (appellee) to any relief or discovery in equity against said receiver? The bill alleges the total indebtedness of the bank at the time of the suspension of payment; the amount collected by the receiver from the assets, and upon the first assessment levied by the comptroller; that these collections were in excess of the total indebtedness of the bank, including interest; and that the second assessment levied by the comptroller was for this reason unnecessary and unlawful."

And the court states the appellee's contention in this language:

"The appellee in the present case dose not deny the authority of the comptroller as declared by these decisions"—meaning

*Kennedy v. Gibson*, 8 Wall., 498, and *Casey v. Galli*, 94 U. S., 673—"but he seeks to avoid the effect of such authority by contending that, while in an action on the part of a receiver of a national bank to recover an assessment, no defense can be interposed by the stockholder to such an action, however excessive or wrongful the assessment may be, nevertheless the stockholder in such a case may restrain the receiver by a bill in equity to enjoin such action; and in support of this contention he relies upon an observation of Mr. Justice Swayne in delivering the opinion of the Supreme Court of the United States in the case of *U. S. v. Knox*, 102 U. S., 422."

The court, in disposing of this contention of appellee, among other things, said:

"Whether that assessment — meaning the first assessment — was sufficient is a question which the law has placed wholly within the power of the comptroller to determine, and without some showing of fraud, accident or mistake, it must be deemed by the court to be insufficient and the necessity of a second assessment conclusive. The obligations of a stockholder of the bank, as well as the power of the comptroller, representing the rights of the creditors of the bank to enforce such obligations, are defined by positive rules; and the point at which the stockholder can deny his liability ceases, and the power of the comptroller to enforce it commences, is clearly established. These rules cannot be countravened or varied by the interposition of a court of equity.
* * *

It follows that the bill does not state facts sufficient to entitle the complainant to any relief in equity and the demurrer should have been sustained. There is still the further objection to the bill that it is a collateral attack upon a judicial or quasi-judicial decision, and under the principles announced by this court in *Brown v. Tillinghast*, 35 C. C. A., 323, 93 Fed., 326 — cannot be maintained."

In that case it was conceded by both parties that the comptroller of the currency had the power and authority, under sections 5151 and 5234, to make a second assessment. The contention of shareholder Campbell was, that the collections already made by the receiver were in excess of the total indebtedness of the bank, including interest, and for that reason the receiver should be restrained from making a second assessment upon the shareholders of said insolvent bank. So it cannot be said that the point raised in the case at bar was raised and decided in *Aldrich v. Campbell*, *supra*.

The question here is one of power of the comptroller under the statute to make a second assessment to enforce the individual liability of national bank shareholders and this question is to be determined by a construction of sections 5151 and 5234.

We respectfully submit that these sections authorize the comptroller of the currency to make only one assessment or decision to enforce the individual liability of national bank shareholders and that the judgment herein should be reversed.

HUGH C. WARD,
*Attorney for Plaintiff in Error.*

No. 122.

Petition for Rehearing.

Rec'd & Dist'd Mar. 21, 1902.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1901.

OFFICE SUPREME COURT of U. S.
RECEIVED
MAR 21 1902

CLEMENT STUDEBAKER,
*Plaintiff in Error,*
*vs.*
JOHN PERRY, Receiver of the National Bank of Kansas City,
*Defendant in Error.*

No. 122.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

## PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

HUGH C. WARD,
*Attorney for Plaintiff in Error.*

JOHN C. BOYARD, PRINTER, N. Y. LIFE BLDG., KANSAS CITY, MO.

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*Defendant in Error.*

No. 122.

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## PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

Now comes the plaintiff in error and respectfully petitions the Court to grant a rehearing in this cause for the following reason:

The opinion rendered herein on its face is inconsistent, illogical and contrary to law, in that considerations of inconvenience and hardship, which are only applicable in the construction of statutes of doubtful language, are applied in construing sections 5151 and 5234 R. S. U. S., while the principle of practical and contemporaneous construction likewise applicable in the construction of such statutes, is denied application on the ground that said sections are plain and free from doubt in their meaning.

In our original brief filed in this case we demonstrated by the decisions of this Court that the obligation of national bank shareholders is to pay the par value of their stock on demand of the comptroller if the assets of their bank are insufficient to pay its debts and obligations no matter how little the deficiency may be. In other words, it is and was our contention, that the comptroller of the currency has the absolute right to collect the full amount of the liability of national bank shareholders in the event of insolvency of their bank. The court, in its opinion, does not deny this proposition but says:

"Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language. The inconveniences that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

"If it be the duty of the Comptroller to give the creditors of an insolvent national bank the remedy providing for the individual liability of the shareholders, and if the law be that he can do so by one assessment only, then he must, no matter what the condition of the bank may appear to be, make an assessment upon the shareholders up to the entire amount of their liability. In many instances, the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's

affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thereon upon the creditors.

"There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences."

It will thus be seen that the court refused to construe sections 5151 and 5234 R. S. U. S., to authorize but one assessment, on grounds of inconvenience and hardship. It is not claimed that said sections anywhere expressly authorize the comptroller of the currency to make successive assessments and that rules of constructions are therefore inapplicable, nor is it claimed that said sections do not authorize the comptroller to collect the full amount of the personal liability of shareholders of insolvent banks in the first instance. It is simply said that there is nothing in said sections to compel the court to construe these sections to authorize only one assessment and that as such a construction might occasion hardship on the stockholders and cause inconvenience, it will be rejected. Considerations of inconvenience and hardship have been applied by this court in construing these sections, and in doing so this court has admitted that these sections do not clearly and expressly authorize the comptroller of the currency to make successive assessments.

It is settled law that considerations of evil and hardship may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and

doubtful, but not when it is plain and explicit. (Sutherland on Statutory Constriction, Sec. 324 and cases cited.)

In Sutherland on Statutory Construction at Sec. 324, it is said:

"The argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences which will cause inconvenience which were probably not contemplated by the framers."

In *Reg. v. Tonbridge Overseers*, L. R. 13 Q. B. Div., 342, the master of rolls said:

"With regard to inconvenience, I think that is a most dangerous doctrine. I agree if the inconvenience is not only great but what I may call absurd inconvenience, by reading an act in its ordinary sense, whereas, if you read it in a manner in which it is capable of being read, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning."

The same has been said of listening to hardship. (Sutherland on Statutory Construction, Sec. 324).

It will thus be seen that considerations of inconvenience and hardship are only applicable in the construction of statutes ambiguous in their meaning. So, it must be conceded that this court must have regarded these sections of doubtful meaning and as susceptible of two constructions; one for which we contend, and the one given them by the court.

It will be remembered that in our original brief we also contended that the practical construction placed upon these sections by the comptroller of the currency, for more than thirty years, ought to have great influence if not a controlling one in a decision of this case. This court met our contention in this language:

"That the language of the statute under consideration is plain and its construction free from doubt are sufficiently shown by the decisions of the courts heretofore cited; and it would be absurd to claim that the plaintiff in error bought his stock in a national banking association with a right to rely on the contingency that the comptroller might inadvertently or mistakenly make an insufficient assessment should the bank become insolvent."

In other words, this court applies, first, considerations of inconvenience and hardship in construing these sections, which considerations are only applicable to doubtful and ambiguous statutes and then disposes of the principle of contemporaneous and practical construction, invoked by us, by saying that these very sections, which this court treated and regarded as open to two constructions in the first part of its opinion, are so plain and explicit that such principle is without application.

If these sections are of doubtful meaning, as this court admits in its opinion by applying considerations of inconvenience and hardship in a construction thereof, then the principle of practical and contemporaneous construction ought to have great weight in a decision of this case.

Construing sections 5151 and 5234, supra, strictly, as the authorities say, they must be construed; it certainly cannot be said that they clearly authorize successive assessments, and if they do not, the uniform practical construction thereof by the comptrollers of the currency for more than thirty years, acquiesced in as it has been for that length of time by congress, ought not to be disturbed and set aside at this late date, by this court, *simply on grounds of inconvenience and hardship, which we have seen, is a most dangerous doctrine.*

In *Robertson v. Downing*, 127 U. S., 613, this court said:

"This construction of the department has been followed for many years, without any attempt of congress to change it, and without any attempt, so far as we are advised, of any department of the government to question the construction except in the present instance. The regulations of a department of the government is not, of course, to control the construction of an act of congress when its meaning is plain, but when there has been a long acquiesence in a regulation, and by its rights of third parties, for many years, have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

And in still a later case, decided by this court, it was said:

"A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the treasury department has not been uniform. The construc-

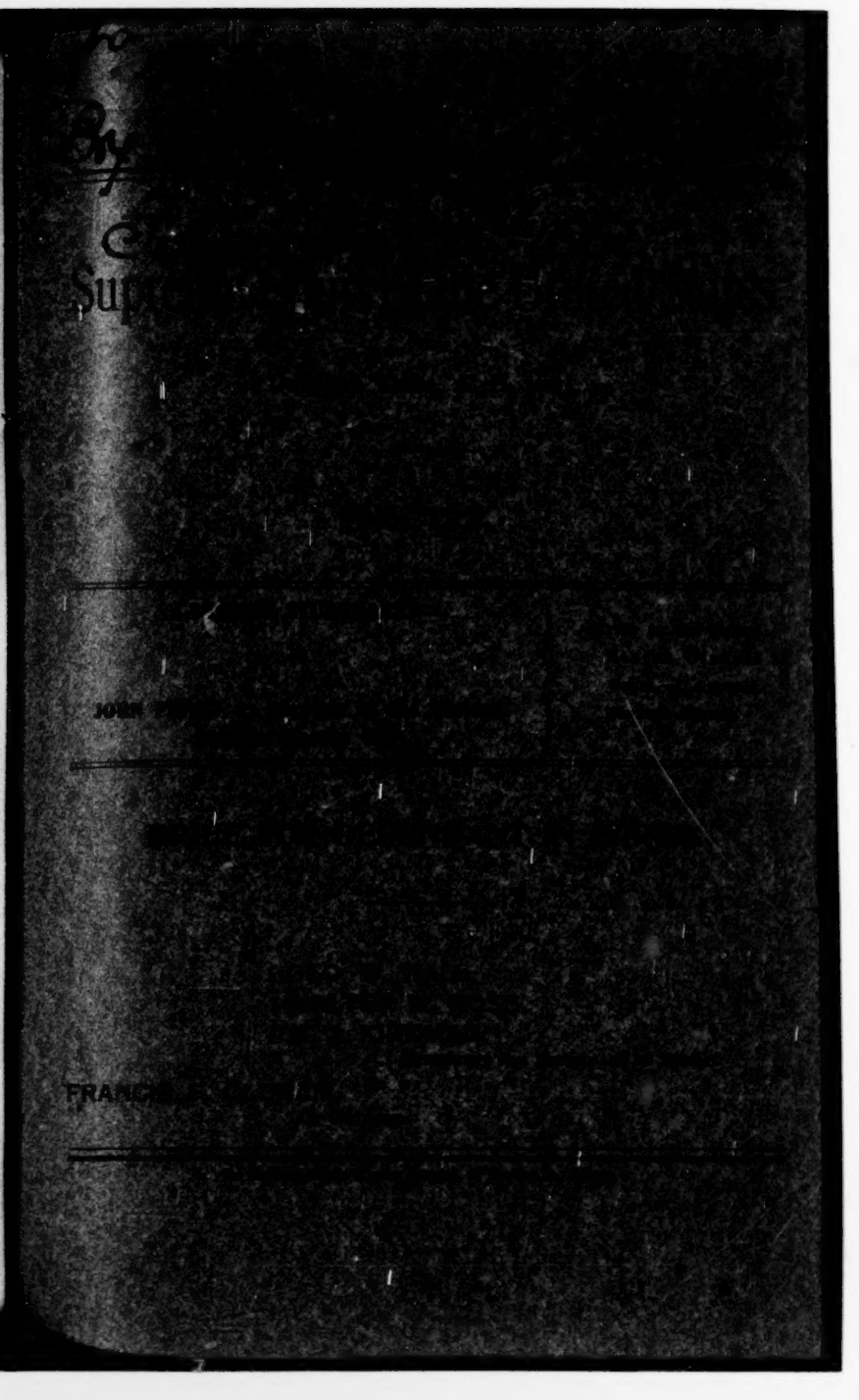
tion contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to-wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons." (*Merritt v. Cameron*, 137 U. S., 542.)

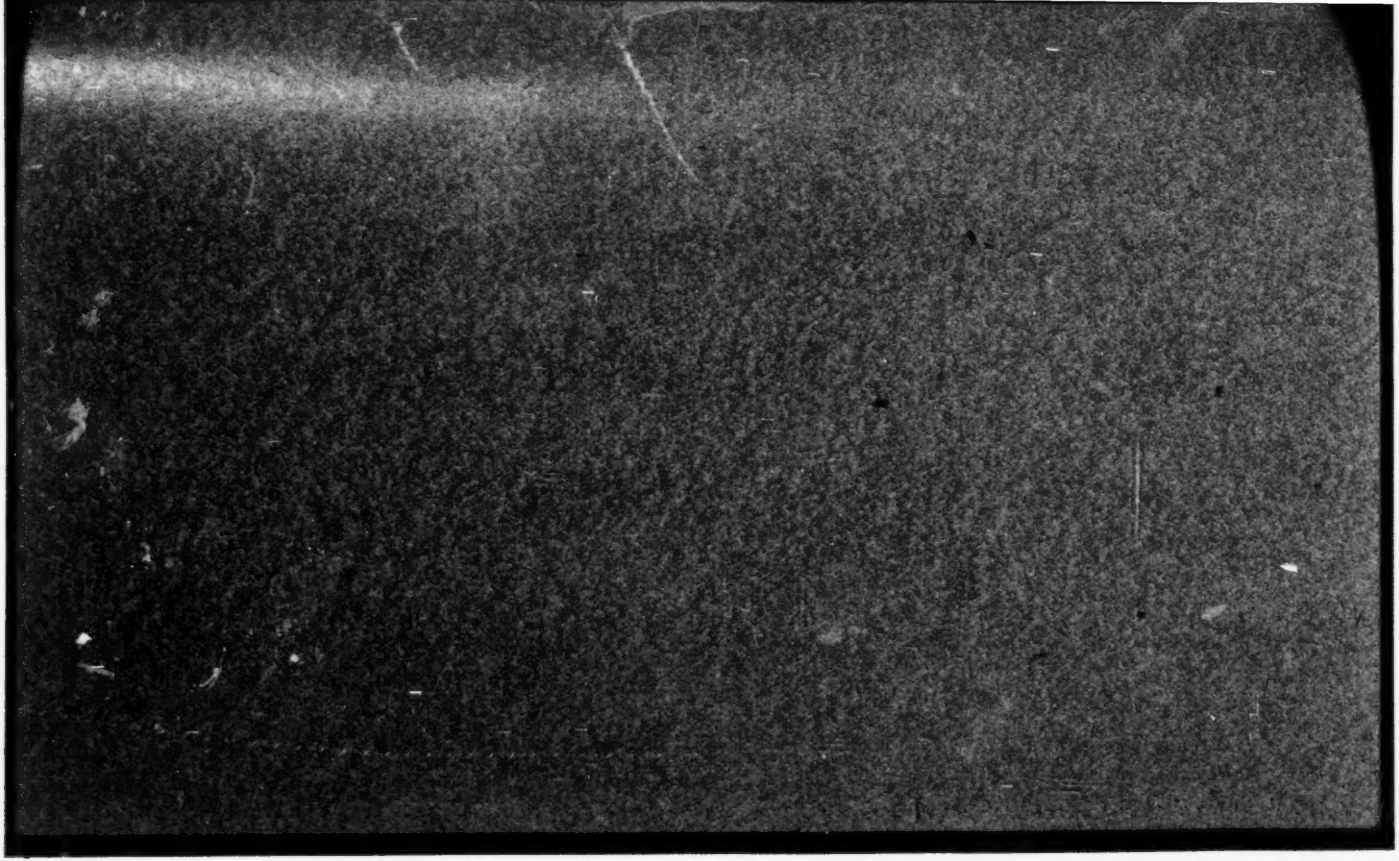
We, therefore, respectfully submit that these sections ought not to be regarded as of doubtful meaning that considerations of inconvenience and hardship may be applied in a construction thereof, and at the same time, plain and free from doubt that the rule of contemporaneous and practical construction may be held inapplicable in a construction thereof.

HUGH C. WARD,
*Attorney for Plaintiff in Error.*

I, Hugh C. Ward, do certify that I am counsel for Clement L. Studebaker, plaintiff in error in the above entitled cause, and that in my opinion the foregoing petition for rehearing is well founded in point of law and is made in sincerity and good faith.

HUGH C. WARD,
*for Petitioner.*





IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

## No. 122.

| | |
|---|---|
| **CLEMENT STUDEBAKER** | Error to the United States Circuit Court of Appeals, Seventh Circuit. |
| *vs.* | |
| **JOHN PERRY, as Receiver of the National Bank of Kansas City.** | |

## STATEMENT.

This writ of error is prosecuted to reverse a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming a judgment of the Circuit Court of the United States for the Northern District of Illinois against the plaintiff in error for the sum of $1,323 and costs. The only question in the case is, whether the comptroller of the currency has the power to levy a second assessment upon the shareholders of an insolvent national bank when the two assessments do not exceed the statutory limit of the shareholders' liability.

The declaration filed by the defendant in error against

the plaintiff in error sets forth the incorporation of The National Bank of Kansas City; the insolvency of the bank; the appointment of plaintiff as receiver; the ownership by defendant of 189 shares of stock of the par value of $100 each; the first assessment by the comptroller of the currency of 16 per cent. on February 11, 1896; the payment of said assessment by defendant; a finding by the comptroller of the currency on the 25th day of February, 1899, that the first assessment was insufficient, and the necessity for an additional assessment of 7 per cent.; the levy of said second assessment; the direction by the comptroller to the receiver to collect it; and the refusal of defendant to pay. (Rec., 3–5.)

A demurrer to the declaration raises the question of its sufficiency in law. (Rec., 7.) The demurrer was overruled, and defendant electing to stand by his demurrer, judgment was rendered for the amount of the second assessment upon the stock owned by defendant. (Rec., 8.) A writ of error was allowed and the case was taken to the Circuit Court of Appeals of the Seventh Circuit, where the judgment of the Circuit Court was affirmed. (Rec., 16–18.) It is sought here to reverse the judgment of affirmance.

## ARGUMENT.

The question presented by the record is whether the comptroller may make a second assessment upon a shareholder of a national banking association in the hands of a receiver. It is not complicated with any questions as to the proper mode of procedure to collect an assessment. The first assessment was voluntarily paid by defendant. There was no suit of any kind against him. As soon as the amount then deemed necessary to be paid by the stockholders was ascertained and declared by the comptroller of the currency, the defendant discharged his liability under that assessment by payment. By his demurrer he admits that the first assessment was insufficient—not large enough, had it all been collected—to pay the debts and liabilities of the bank.

He admits that he has paid only 16 per cent. of the amount of his stock; that he was originally liable for 100 per cent., if so much was needed; and that an additional 7 per cent. is necessary to pay the debts and liabilities of the bank. But he contends that the comptroller of the currency exhausted all his power to levy an assessment by a single exercise of that power. It is insisted that, although valid debts of the bank, for which he was liable, if necessary, to the full extent of 100 per cent. of the par value of his stock, remain unpaid, yet it was his good fortune that the necessity for a larger assessment than 16 per cent. was not apparent when the first assessment was levied, resulting in his absolute discharge from liability and the corresponding loss of the creditors of the bank. His contention, if correct, shows that the laws of the United States

relating to national banks are radically defective in not providing an adequate remedy for the enforcement of the liability of stockholders. This we respectfully deny.

The liability of shareholders in national banks is fixed by sections 5151 and 5152 of the Revised Statutes of the United States, which are as follows:

"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders of any banking association now existing under state laws having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of twenty per centum such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency the comptroller of the currency may compel the association to close its business and wind up its affairs under the provisions of chapter Four of this title.

Sec. 5152. Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be if living and competent to act and hold the stock in his own name."

The only statute expressly and directly providing for the enforcement of the shareholder's liability is section 5234, which is as follows:

"On becoming satisfied, as specified in sections 5226 and

5227, that any association has refued to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

Excerpted from the language providing for the other duties of the receiver, all that Congress has said, expressly relating to the remedy, is:

"Such receiver, under the direction of the comptroller, * * * may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

Considered alone this language might seem to authorize the receiver under direction of the comptroller to bring suit to enforce the liability without any previous assessment. But considered in connection with the other duties provided for in this and other sections relating to winding up the affairs of an insolvent national bank it has been held that the comptroller has the exclusive power to determine what amount it is necessary for the stockholders to pay, and that suit can be maintaind by the receiver only after such levy of an assessment by the comptroller.

*Kennedy* v. *Gibson*, 8 Wall., 498.

The obvious purpose of the foregoing statutes is that the stockholders shall be liable for the full 100 per cent. of the par value of their stock, in addition to the amount invested therein, if it be necessary to pay the debts of the association, and that such full liability shall be enforced by the comptroller, who is charged with the execution of the law. The amount to be paid by them is the deficiency of the assets, and it is apportioned among the stockholders in the proportion which the stock of each shareholder bears to the whole capital stock of the bank.

*U. S.* v. *Knox*, 102 U. S., 422.

When this assessment is made it is the duty of the stockholders to pay it, and if they perform their duty as is contemplated by the statute, no suit of any kind is necessary. The courts are appealed to only to enforce the liability ascertained by the comptroller when the stockholders refuse to pay to the officer authorized to receive payment, the comptroller's receiver. In this respect there is radical distinction between the remedy provided for enforcing the statutory liability of stockholders in a national bank and the remedy against stockholders usually provided by the corporation laws of the states. In the latter case courts are the only instrumentality for enforcing the remedy. Judicial action is necessary to liquidate and fix the liability, as well as to collect it. Prior to a suit the stockholder can pay neither to the corporation nor to the creditor. All the stockholders are brought into equity. A receiver is appointed by the court. The amount necessary to be paid by the stockholders is fixed by the court. If it is not paid to the receiver when so ascertained and fixed by the court, he enforces payment, either in the original suit, or by an ancillary suit. The amount to be paid by each stock-

holder is fixed by an interlocutory decree of the court. If new and additional debts of the corporation are brought to light, or the assets shrink during the suit, or some of the stockholders prove to be insolvent (when they are sureties for each other), the court increases the amount to be paid by a second or third interlocutory decree; that is to say, *by successive assessments*, until the full statutory liability of the stockholders is exhausted.

*Pollard* v. *Bailey*, 20 Wall., 520.
*Godfrey* v. *Terry*, 97 U. S., 171.
2 Morawetz on Corp., Sec. 902.

But under the United States statutes relating to National Banks the *whole power* of ascertaining and fixing the liability is delegated to the comptroller. The judicial power of the Courts is limited to enforcing *payment* of the sum required by the comptroller.

The relative powers of the comptroller and of the courts were thus defined in the early case of *Kennedy* v. *Gibson*, 8 Wall., 498, above cited. In that case the receiver, by a bill in equity showing the necessity for an assessment against the stockholders of an insolvent national bank, applied to the court to *make* and enforce the assessment. On appeal to this court it was held that the power to assess the stockholders is vested exclusively in the comptroller. Mr. Justice Swayne said:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders can not controvert

it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount to be collected shall be formally ascertained. This would greatly protract the final settlement and might be attended by large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims.. Time will be consumed in the application of these tests, and the result in many cases can not be forseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying the demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

It seems to be clearly implied in the foregoing opinion that the comptroller may levy successive assessments as they may appear to be necessary. If the power can be exercised only once no reason is apparent why equity should

have jurisdiction for the collection of an assessment for less than 100 per cent. If the stockholders' liability is fixed once for all by the first assessment of the comptroller, the legal remedy for the collection of a 10 per cent. assessment is as full, adequate and complete as it is for the collection of the 100 per cent. assessment.

The reason why, when the assessment is for the 100 per cent., the proceedings *must* be at law, and when for a less amount it *may* be in equity, is obvious. When the full amount is assessed there can be but *one* suit against each stockholder. He is sued for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment, however, is made, *there may be other assessments*. Hence, while the receiver is at liberty to sue at law for even a partial assessment, equity has concurrent jurisdiction to prevent a multiplicity of suits.

*Bailey* v. *Tillinghast*, 99 Fed., 801, 805.

In a later case this court expressly recognized the power of the comptroller to levy second assessments. In *U. S.* v. *Knox*, 102 U. S., 422, a creditor sought by mandamus to compel the comptroller to levy a second assessment upon solvent stockholders to make good what could not be collected on the first assessment from insolvent stockholders. One of the most obvious defenses, if sound, was want of authority in the comptroller to levy a second assessment for any purpose. The court, however, refused the writ for the sole reason that stockholders are not sureties for each other, and say:

"Although assessments made by the comptroller under the circumstances of the first assessment in this case and *all other assessments, successive or otherwise*, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce

one made clearly and palpably contrary to the views we have expressed, it can not be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction."

Subsequently the power to levy successive assessments was directly involved in a decision by this court upon a motion to dismiss for want of jurisdiction.

In the Circuit Court of the United States a decree had been entered upon an assessment by the comptroller for an amount not sufficient to justify an appeal. But this court held that, as a *further assessment might be made*, the amount in controversy included the contingent liability, as well as the actual amount decreed to be paid by defendants, and on this ground denied a motion to dismiss the appeal.

*Germanica National Bank* v. *Case*, 131 U. S., Appendix CXLIV.

Unless the comptroller had power to levy a second assessment there was no ground for this court to assume jurisdiction in the case just cited. The amount called for by the comptroller and for which a decree had been rendered was insufficient to give jurisdiction on appeal. The right to an appeal necessarily involved the right of the comptroller to levy a further assessment. This ruling is decisive of the case at bar.

Repeated efforts have been made to induce this Court to recede from the construction placed upon the statutes conferring power upon the comptroller in *Kennedy* v. *Gibson*. It has been urged that the power to determine the necessity for an assessment upon stockholders and to fix the rate is judicial power, and can not constitutionally

be vested in an officer belonging to the executive department of the government. Such efforts have uniformly failed. In the latest case before this court in which this contention was made Mr. Justice White, speaking for the court, says:

"All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power, in violation of the constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy* v. *Gibson*, 8 Wall., 498; *Casey* v. *Galli*, 94 U. S., 674; *U. S.* v. *Knox*, 102 U. S., 423."

*Bushnell* v. *Leland*, 164 U. S., 684.

As the duty of making a ratable call on the stockholders is vested exclusively in the comptroller, if one assessment only can be made it follows that the only safe way of securing a sufficient amount is, either to call for the full 100 per cent. at once or to wait until all the assets of the bank are converted into money and all its debts ascertained. The former policy would be unjust to the stockholders, the latter to the creditors. The former policy would require in many instances a very large sum of money paid by stockholders to be locked up for years in the treasury of the United States, and returned to them without interest.

Indeed, it may well be doubted whether the comptroller has power to levy an assessment for a greater amount than appears to be necessary to pay the debts. The express

language of the statute is, that the receiver, under the direction of the comptroller, "may, *if necessary to pay the debts of such association*, enforce the individual liability of the stockholders." For the comptroller to levy the full assessment of 100 per cent. when a small per cent. only appeared to be necessary, would be a plain violation of the spirit of the statute, which is designed to protect the stockholder against unnecessary hardship. It was plainly not the intention of Congress that, upon a mere possibility of the 100 per cent. being required to pay the debts, the stockholders should pay it in cash as a sort of guaranty fund. On the other hand, if the comptroller waits until all the assets of the bank are converted into cash and all its liabilities exactly ascertained, there would be great delay, extraordinary expenses and frequent losses arising from the removal or insolvency of stockholders. In *Kennedy* v. *Gibson* the court say:

"It would be attended with injurious consequences to forbid action against the stockholders until the precise amount to be collected shall be formally ascertained."

We respectfully submit, therefore, that a reasonable construction of the statutes, empowering the comptroller to enforce the liability of the stockholders, requires that he should with reasonable diligence call for such an amount only as may appear to be necessary to pay the debts and liabilities of the bank; and that additional calls should be made as subsequent necessities arise, until the full statutory liability is exhausted.

Thus only can he use "the judgment and discretion" which this court in *Kennedy* v. *Gibson* say is given him by the statute.

With the single exception of *DeWeese* v. *Smith*, 97 Fed., 309 (reversed by *DeWeese* v. *Smith*, 106 Fed., 438), every case where the question has been considered sustains the power of the comptroller to levy successive assessments.

*Aldrich* v. *Yates*, 95 Fed., 78.
*Aldrich* v. *Campbell*, 97 Fed., 663.
*Studebaker* v. *Perry*, 102 Fed., 947.
*DeWeese* v. *Smith*, 106 Fed., 438.

In *Aldrich* v. *Yates*, 95 Fed., 78, the exact question was presented to the Circuit Court of the United States for the District of Kentucky. The court said, p. 80:

"The ultimate liability of the shareholder in such cases is for the full amount of the par value of the stock (section 5151), under the statutory conditions, if they are found by the comptroller to exist. A mistake of that officer in making an estimate of the amount of a needed assessment cannot be held to release the shareholder from the full statutory liability. A mistake of such a character would be natural, if not inevitable, in many instances, in view of the uncertain value of assets; and the indisposition in the first instance to make an assessment unnecessarily large may well excuse its not being done, when there is certainly no statutory provision prohibiting, in terms, or by necessary implication, further assessments, if the necessity exists."

*Aldrich* v. *Campbell*, 97 Fed., 663, is a decision by the Circuit Court of Appeals of the United States, Ninth Circuit. Aldrich, receiver, had begun an action at law to collect a second assessment from Campbell, a stockholder. Campbell brought suit in equity to restrain the action at law on the grounds that the assessment was unnecessary and exceeded the jurisdiction of the comptroller. An interlocutory restraining order was granted, from which the receiver appealed. The court say, p. 665:

"It is admitted by the appellee that the comptroller's action in levying the first assessment was conclusive upon

the shareholders, but he contends that, under the facts stated, the second assessment was a wrongful and illegal one, and exceeded the jurisdiction of the comptroller."

The court quotes from *Kennedy* v. *Gibson* the passage quoted above herein; also cites *Casey* v. *Galli* and *U. S.* v. *Knox*, and says, on page 668:

"The comptroller has found the amount (of first assessment) insufficient to meet all the bank's liabilities, including interest on the debts of the bank accruing subsequent to the first assessment and the expenses of the receivership, and in accordance with the power and authority, judicial and executive, vested in him has levied a second assessment upon the shareholders. The authority to do this is not controverted even in the case just cited (the Knox case). On the contrary it is there said: Assessments made by the comptroller under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders."

And on p. 669 the court say:

"On the 30th day of January, 1899, the comptroller levied a second assessment, equally and ratably, on all the stockholders of the bank, at the rate of $17 per share, making a total for the two assessments of $82 per share. These two assessments, being together $18 less than the par value of the stock, were within the jurisdiction of the comptroller to make in the proceedings which he had instituted to wind up the affairs of the bank."

And it was accordingly held that although the bill alleged that the second assessment was unnecessary because the assets together with the first assessment were sufficient to pay the obligations of the bank, yet the court of chancery would not overrule the opinion of the comptroller on that point nor would it inquire into the matter, and permitted the receiver to proceed with a suit at law to collect a second assessment.

It is remarkable that neither in that case nor in the Knox case was it deemed a matter of argument that a second assessment was impossible because the first had exhausted the power. That would have been a very convenient answer to the position urged upon the court.

If the power was all exhausted by the first assessment then the second was void and would have been denied or stayed for that reason.

In the case of *Studebaker* v. *Perry*, 102 Fed., 947, now under review by this court, Judge Woods says in the opinion (Rec., 17):

"The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the comptroller the receiver is authorized to enforce the shareholders' liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design."

In *DeWeese* v. *Smith*, 106 Fed., 438, all the reasons which have been suggested why the comptroller has no power to levy a second assessment were fully considered by the Circuit Court of Appeals of the Eighth Circuit and pronounced unsound. The case in the Circuit Court differed from that now under consideration in that the defendant had been sued at law by the receiver of a national bank for the amount due under the first assessment and a judgment was rendered against him. (Here the defendant has voluntarily paid the first assessment.) A suit at law having been brought upon the second assessment, it was contended first that the judgment in the first suit was a

bar to a second suit, though upon a later assessment; secondly, that a single exercise of the authority to levy an assessment by the comptroller exhausted the power; and, thirdly, that the uniform practice of the department, prior to the term of the present comptroller, having been to levy but a single assessment, constituted a practical construction of the statutes which ought not to be disturbed by the courts. The Circuit Court sustained the defense upon each of the grounds contended for and rendered judgment against the receiver (97 Fed., 309). The judgment was reversed by the unanimous decision of the Circuit Court of Appeals.

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In the case at bar no question as to the effect of a former judgment is involved. The defendant having voluntarily paid the first assessment, the sole question is, has the comptroller power to levy a second assessment? If the power is lacking it is either because the power to levy assessments is exhausted by one exercise of it or because a continuous refusal or neglect by comptrollers for many years to exercise the power of levying a second assessment has deprived subsequent comptrollers of the power, or for both these reasons.

The comptroller is vested with a general power, with a general object in view. It is not said in the statute that he shall make one effort to enforce the liability, but broadly that he may enforce the liability, which may involve many efforts.

By what canon of construction shall we add "but he shall make only one assessment"?

To repeat somewhat; in *Kennedy* v. *Gibson* it was dis-

tinctly ruled, for reasons given, that the comptroller must act promptly, must not wait until the assets of the bank have all been collected and reduced to money, and that he must exercise his best judgment as to how much will be required from the shareholders. Now, if he must act without delay and must use such discretion, it follows, as a necessary consequence, that he may make a second assessment, if the first is insufficient.

Otherwise he will be compelled for the sake of safety to levy the whole amount at once, although, according to his best judgment from his then standpoint, it will not be necessary to call for half of it, or even a tenth; but because the assets may shrink to nothing from the insolvency of debtors, the intervention of legal defenses, the failure of titles, and other causes, he must call for the whole. Thus, if he can make but one assessment, he is absolutely prevented from exercising any judgment or discretion whatever as to how much is necessary. And so the element of discretion and judgment on his part would be entirely eliminated.

That the law does not contemplate, and that this court does not mean, by the language used in *Kennedy* v. *Gibson* and in *Germanica National Bank* v. *Case*, that, when a partial assessment is once made by the comptroller, further assessments, if necessary, can only be made by a court of equity in a suit pending on the original assessment, is also obvious from the fact that such a construction of the law implies that the stockholders may prevent a second assessment by paying the original partial assessment. The assumption is that if the stockholders, when partially assessed, promptly pay the assessment, no further assessment can be made on them.

Now, if that would be a good answer in a suit at law upon a second assessment, why would it not be a valid objection to a second assessment in a suit in equity?

If a court of equity or the comptroller can make a second assessment only in a pending suit in such court, the statute has provided for a 100 per cent. liability which can be enforced only when the stockholder wrongfully refuses to pay a partial assessment, or when the comptroller assesses the full amount at once. When a position leads to an absurd conclusion it is untenable.

Any construction of the statutes which requires the interposition in any manner of a court of equity to make or justify a second assessment seems to overlook the fact that the *power to assess* belongs exclusively to the *comptroller*, and the power to *enforce the assessment* to the *courts*. Such construction confuses the remedy provided by this statute of the United States with the ordinary remedy for the enforcement of the statutory liability of stockholders by the courts.

To hold that the comptroller must make the first assessment—must decide whether the whole or a part shall be collected—because the statute has referred this question to his judgment and discretion, but that a court of equity must make, or assist in making, the second assessment, we respectfully submit, is plainly inconsistent. There is nothing in the statute or in the decision of the courts to indicate that the whole power of assessing the stockholders is not vested in the comptroller.

Whether a single exercise of quasi-judicial power conferred by the legislative department of government upon an executive officer exhausts such power depends entirely on the nature and extent of the power so conferred.

There is a clear distinction between cases where some single *particular act* involving judicial discretion is to be performed by an executive officer and cases where the whole matter requiring repeated exercise of discretionary power is committed to his jurisdiction. The authorities relied upon by plaintiff in error are all cases where the quasi-judicial power was limited to a single act, as in *Germaine* v. *Waggoner*, 1 Hill, 279. In that case a statute of New York directed canal commissioners to make surveys, levels and estimates for a canal and *to adopt a plan*. After the plan had been adopted and the work done, the commissioners undertook to raise the height of a dam six inches, whereby the plaintiff was injured. The court say:

"Had the statute stopped with a general authority to construct and complete the canal, the power to authorize the raising of any dam in the outlet at any stage of the work would be implied."

The case, also relied upon, of *People* v. *Board of Supervisors of Schenectady*, 35 Barb., 408, is of a similar nature. The supervisors were clothed with power to apportion a tax to be raised among the several towns and wards of the county as seemed to them equitable and just. It was held that after the apportionment had been made and recorded by the clerk the power of the supervisors was exhausted. On page 416 the court say:

"Where a judicial body is limited to a single act, by the performance of the act their power becomes *functus officio*."

These cases clearly do not apply to the quasi-judicial power of the comptroller, who has the exclusive charge of insolvent national banks. He is clothed with the general power and duty of assessing the stockholders to the full extent of their liability.

The comptroller's power is more nearly analogous to

that of the water commissioners for the City of New York, who, under an act for supplying the City of New York with water, were authorized to enter upon land for that purpose, and in case of disagreement with the owner as to the value, appraisers were to be appointed by the vice-chancellor to assess the value of land required. It was held that, after the commissioners had taken what they deemed sufficient land and the assessment had been made, they had power and authority to take additional land on being convinced that an insufficient quantity was taken by their first judgment.

*In re Water Commissioners*, 3 Edw. Ch., 552.

In this connection it was also argued in behalf of plaintiff in error that the liability is single, indivisible and cannot be split, so as to constitute more than one demand or cause of action. The liability here involved is not to be likened in the matter of singleness or indivisibility to the ordinary case of liability upon contract or tort.

Not one of the cases cited is like this, as will be seen upon the barest reference to them, and they cannot in any fair sense be regarded as in point here. The liability under consideration is imposed by statute for the security of creditors.

It is for "all debts, contracts and engagements" of the bank, and is to the extent of the amount of stock held by the shareholders equally and ratably, and not one for another. It is not a primary liability, but arises upon ascertaining that the assets of the bank are not equal to its indebtedness.

It is not for a fixed and definite sum; it may be more

or less, not exceeding the limit, and is ratable among the stockholders.

The comptroller is empowered to enforce it, and in order to do so he must first ascertain it, and he must do this in advance of the collection of the bank assets, which implies that his ascertainment must be merely an approximation. The liability is contingent, depends upon how much is needed, and is not unlike a subscription for corporate stock, in that it is payable when called, when assessed. It is not all due at once, nor is any of it due until the need appears.

Even after it is paid upon an assessment, whatever is not required must be refunded.

Its leading characteristics distinguish it from the ordinary, definite, absolute liability growing out of contract or tort, and to say that it is like such liability in the respect contended for seems to confuse terms and ideas and to ignore essential differences.

The rule contended for is not universal even in respect to contracts, though it is general. For instance, the case of rent where the title of joint lessors is severed; the lessee must pay each owner according to his proportion; and where the lessor dies, the rent subsequently due will be apportioned to the heirs or devisees and each may sue for his share. This exception arises from the necessity of the case and is familiar.

Certain bank charters in Illinois provided that "when default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively," and it was repeatedly held that an action at law would lie

against each stockholder at the instance of a single creditor.

*Schalucky* v. *Field*, 124 Ill., 617, and cases cited.

In one of the earlier cases, *Culver* v. *Bank*, 64 Ill., 538, it was said:

"It is no objection that the stockholder may be subjected to several suits, as he can in no event be answerable for more than the amount of his stock."

The provision in these charters is not very different from the provision of section 5,151, and it was held to create a primary liability not dependent upon an adjustment of the affairs of the bank.

In this respect section 5,234 introduces the modification of *necessity* when liability is enforced by the comptroller, yet the general character of the liability, in being for *all* debts and engagements of the bank, is similar. The feature of successive demands recoverable at law until the whole liability is exhausted is common to both cases, and the answer to the objection above quoted is applicable here.

It seems quite inappropriate to quote the maxim that no one shall be twice vexed for one and the same cause. It is not one and the same. The law merely provides that the shareholder shall pay what may be necessary to meet the deficit. How much that is cannot be ascertained with certainty at once, but as it is important that liquidation shall progress without delay, it is just to him that he be called for no more than seems to be necessary, and it is just to the creditor that further calls may be made when necessary. In the very nature of the case this contingent liability is subject to be drawn upon

from time to time as needed, until exhausted. Any other view involves a judicial restriction upon general terms with the unfortunate result of unnecessary hardship to the stockholder, or unnecessary risk of loss to the creditor.

The fact that it had been the practice of the comptroller's office for many years to levy but a single assessment is relied upon as an argument against the power to levy more than one assessment. The principle is invoked that,

"The construction given to the statute by those charged with the duty of executing it ought not to be overruled without cogent reasons."

That there were cogent and sufficient reasons for changing the practice of the comptroller's office in this respect cannot be more clearly shown than by a reference to the report of the comptroller of the currency for the year 1898. Vol. 1, p. XXXVI *et seq.* Stating the former practice, the change made, the reasons therefor, with illustrations of the practical results under the former and present rulings of the office; from which it will be seen that the experience of the office dictated a change and that the subject received very careful consideration and thoughtful treatment in the light of such experience.

The report says in substance that the former practice of the office, which was to regard the levy of an assessment as irrevocable and unchangeable notwithstanding subsequent developments, demonstrated error therein had been found in many cases to be inconsistent with the fulfillment of the law: that if an ordinary trustee representing two parties to a settlement is charged with the collection of a debt

from one to the other after collecting what he believes to be due finds he has not collected enough it would be his duty to collect the balance; and on the other hand if he found he had collected too much he should return the overplus, and that the comptroller should be governed by these rules in making assessments upon shareholders; that the assessment being made generally before the final liquidation of the assets it is difficult to estimate with accuracy in advance how much will be required owing to various contingencies, and that errors therein are inevitable and unavoidable, making a second assessment indispensable in many cases. After stating these matters somewhat in detail the report quotes from the opinion of this court in the case of the *United States* v. *Knox*, *supra*, and reaches the conclusion that the comptroller should exercise the power of review, for the purpose of making an additional assessment when necessary, and for the purpose of returning any excess that may equitably be due to shareholders.

Instances are then cited, and these with figures in detail illustrate the situation in numerous cases, and demonstrate the propriety of the position taken.

Thus the comptroller having found that the former practice led to unsatisfactory results undertook to correct it and to proceed thereafter upon the line which reason and experience demanded.

Now it is argued that the former practice could not be changed because it had placed a construction upon the statute which the courts must enforce, and in doing so must overrule the action of the comptroller, which action, the argument implies, would be proper but for the former practice.

Let it be conceded for the sake of argument that former comptrollers of the currency were of opinion but one assessment could be made, and that the practice was changed by the present comptroller; the question is whether he was bound by the views of his predecessors.

Plainly stated, the proposition is that because former comptrollers entertained a certain opinion as to the proper administration of the office he must entertain it also and follow it regardless of consequences; he is bound by previous rulings; an erroneous, unjust, unwise course heretofore pursued must be continued, and not only so, but the courts will decline to read the law for themselves, and will implicity observe the so-called precedent and enforce obedience thereto. And this, by reason of a supposed application of the doctrine of contemperaneous and practical construction. What is that doctrine?

It is discussed somewhat fully in Cooley on Constitutional Limitations (5th Ed.), Sec. 67 *et seq.* Referring to the practical construction of a constitutional provision, the author says:

"And when this has been given by officers in discharge of their official duty and rights have accrued in reliance upon it which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight."

Later on, Sec. 69:

"If the question involved is really one of doubt the force of their (officers') judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind. Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow intrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical

construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmaker";

And then quotes from Story on Const., 407:

"Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries."

He proceeds to say that this, the true and only safe rule, appears upon first reading not to have been followed in all the reported cases. After examination of some of these he concludes:

"We think we allow to contemporary and practical construction its full legitimate force when we suffer it where it is clear and uniform to solve in its own favor the doubts which arise on reading the instrument to be construed."

So in Sedgwick on Statutory Law, 251:

"*Contemporaneous Exposition*—In seeking aid to construe an obscure or doubtful statute, considerable weight is attached to the opinions in regard to it entertained by persons learned in the law at the time of its passage."

The author then considers legislative exposition, judicial construction and usage, and quotes (page 256) from a New York case:

"Lord Coke's expression that common opinion is good authority in law does not apply to a mere speculative opinion in the community as to what the law on a particular subject is; but when such opinion has been frequently acted upon and for a great length of time by those whose duty it is to administer the law and important individual rights have been acquired or are dependent upon such practical construction of the law, this expression of the learned commentator upon Littleton is entitled to great weight."

In Am. & Eng. Ency. of Law, Vol. 23, page 342, it is said:

"This rule of usage followed in the interpretation of a

statute has been said to apply only to cases where the language is ambiguous: When it is plain and unambiguous it is said that a practical construction in conflict with it must be corrected. * * * The construction of a statute in accordance with established practice will be especially followed by the courts in cases where departure from such construction would result in great mischief or where property rights would be disturbed."

In *U. S.* v. *Graham*, 110 U. S., 219, it is said:

"Such being the case it matters not what the practice of the department may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation; if there were ambiguity or doubt then such a practice begun so early and continued so long would be in the highest degree persuasive, if not absolutely controlling, in its effect; but with language clear and precise and with its meaning evident there is no room for construction and consequently no need for anything to give it aid."

In Illinois a leading case is *The People &c.* v. *Loewenthal*, 93 Ill., 191, involving the validity of a bank charter. An extract from the text of Cooley, above referred to, was quoted, and it was held that as the point was difficult and as important rights had accrued upon the faith of the contemporary construction of the constitution which supported the particular charter and many others like it, the argument *ab inconvenienti* should have great weight.

It will be seen that though there may have been loose and general expressions in some of the cases, yet the true rule is that contemporary or practical construction will be resorted to merely as *an aid* when the statute is *doubtful or obscure*, and then only for the purpose of *saving important rights*, built up or acquired on the faith of such construction. A leading case, cited in all the books, is *Rogers* v. *Goodwin*, 2 Mass., 447, where the title to large and valu-

able estates in various parts of the commonwealth were affected, and would have been disturbed by disregarding a certain construction which by long usage had been placed upon an ancient colonial statute; and great weight was there given the argument *ab inconvenienti*, which turned the scale in the judicial mind.

In the case at bar there is no obscurity or ambiguity, and no rights have been acquired upon the faith of the supposed practical construction, which would be disturbed or injuriously affected by a change in the practice of the department. Thus, each of these elements which are always considered in resorting to the aid of such construction is wanting.

On the other hand, however, the practice adopted by the present comptroller is to make asesssments according to the apparent necessity at the time, with the purpose of making others should a change in the situation disclose the necessity therefor.

Should it now be held because of the former practice one assessment exhausts the power, it will happen that many creditors will receive less than their dues, while many shareholders will have paid less than their liability, and under such ruling they can escape further payment.

Thus an artificial rule of construction will be perverted in its application so as to produce that kind of injury which it was specially devised to prevent.

Finally, it must be observed, as readily occurs to the mind at first, that usage or practical construction is invoked only for the purpose of *sustaining* some rule or regulation the validity of which is in issue. The argument always is: This interpretation should be followed because it is in accordance with settled practice, and since

the statute is difficult of construction and since rights have accrued which would be disturbed by a change, let the consideration, *ab inconvenienti*, turn the scale, and the official construction stand as law.

But here the effort is to *overrule* a well-considered construction adopted by the department, and to set *aside* its action based thereon. The reason assigned is that formerly the department took a different view of the matter; therefore, that view (which the argument must concede has no support except its antiquity) shall prevail, and abrogate any other. A confessed error must be perpetuated. An admitted wrong can never be corrected.

We submit that this is an attempt to prostitute the rule to a purpose never designed and to which it is not adapted.

That a continuous and uniform practice by officers in executing a statute should receive the respectful consideration of courts in the construction of such statute is well settled. But the principle has no application to a case where the executive department itself inaugurates a reform. The presumption is that the change was made in the light of experience, after full consideration and for good cause. Other things being equal later decisions are entitled to greater weight than earlier ones. The comptroller's department has simply overruled its former decisions. An overruled authority is at a discount when the overruling tribunal is of superior or co-ordinate rank.

It is respectfully submitted, therefore, both on reason and authority, that the power to determine the necessity of assessing the stockholders of an insolvent national bank and to fix the amount to be paid by them within the limits of their statutory liability having been vested in the comptroller of the currency, should be freely exercised by

that officer with due regard to the rights of creditors and shareholders. The main object of the statute should be kept in view; that is, the liability of the shareholder and the security thereby afforded. This legislation affects a most important interest. It was designed to protect as far as possible the creditors of national banks, and thereby to strengthen the system, and should be so construed as to promote that design.

Canons of construction are useful merely to ascertain the intent of the law.

The intent here is not in doubt. There is no need to invoke technical rules nor is there occasion to add anything to what is expressed.

A plain measure of liability is imposed, with a clear power to enforce it as far as necessary without limitations or restrictions as to methods. Far-fetched and inapt analogies should be disregarded.

There is nothing in the situation of creditor or shareholder or in the terms of the law, making it fit or appropriate that the assessment should be for the full amount when not apparently required, or forbidding a subsequent assessment when the first is for any cause not sufficient.

The judgment should be affirmed.

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# Supreme Court of the United States.

No. 122.—October Term, 1901.

Clement Studebaker, Plaintiff in Error,
*vs.*
John Perry, as Receiver of the National Bank of Kansas City.

In error to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 24, 1902.]

On November 9, 1899, in the Circuit Court of the United States for the Northern District of Illinois, John Perry, as receiver of the National Bank of Kansas City, brought an action against Clement Studebaker, to recover an assessment made by the Comptroller of the Currency on stock held by the defendant in said bank.

The declaration set forth the incorporation of the National Bank of Kansas City; the ownership by the defendant of 189 shares of its capital stock of the par value of $100 each; the insolvency of the bank; an assessment by the Comptroller of the Currency on February 11, 1896, of sixteen per cent on the stock; the payment by the defendant of said assessment: a finding by the Comptroller of the Currency on February 25, 1899, that the first assessment was insufficient and the necessity of an additional assessment of seven per cent; the levy of said second assessment; the direction by the Comptroller to the receiver to collect it, and the refusal of the defendant to pay.

A demurrer was filed raising the question of the sufficiency in law of the declaration. The demurrer was overruled, and the defendant electing to stand by his demurrer, judgment was rendered for the amount of second assessment upon the stock owned by the defendant. A writ of error was allowed, and the cause was taken to the Circuit Court of Appeals of the Seventh Circuit, where the judgment of the Circuit Court was affirmed. (102 Fed. Rep. 947.) The case was then brought to this court by a writ of error duly allowed.

Mr. Justice Shiras delivered the opinion of the Court.

The single question for our determination is whether the Comptroller of the Currency, acting under the national banking laws, can validly make more than one assessment upon the shareholders of an insolvent national banking association.

It is not denied by the plaintiff in error that the first assessment, which he voluntarily paid, was insufficient to pay the debts and liabilities of the

bank, but his contention is that the Comptroller of the Currency exhausted his power to levy assessments upon the shareholders of stock in an insolvent national bank by a single exercise of that power. He advances two arguments in support of his contention: First, that the individual liability of national bank shareholders is contractual, and that hence only one assessment and suit to enforce the same is authorized by law; and, second, that by a course of practice for many years the Comptrollers of the Currency, charged with the execution of the laws, construed them to authorize but one assessment, and that such construction is now conclusive upon the courts.

Those portions of the statutes which are involved in this controversy are found in section 5151 of the Revised Statutes of the United States, in the following terms:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares. . . ."

And in section 5234 in the following terms:

"On becoming satisfied, as specified in sections 5226 and 5227, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

And section 5236, as follows:

"From time to time, after full provision has first been made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all such claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

The proposition of the plaintiff in error, as expressed in the brief of his counsel, is "that section 5234 simply authorizes the Comptroller to enforce the individual liability of shareholders in a national bank, if necessary to pay the debts of such bank; that the Comptroller is therefore plainly authorized to decide as to the necessity of enforcing such liability and as to the time when the same is to be enforced, and fix the amount to be collected; that there is to be a decision by the Comptroller as to these matters, and then a demand or requisition by him, followed by one suit, at law or in equity, as circumstances require; that it is this decision, which is termed an assessment; that the Comptroller is nowhere expressly authorized to enforce such liability by several decisions and suits; that he is simply authorized to enforce the individual liability of national bank stockholders according to law; and that there can be but one decision by the Comptroller as to the time, necessity and extent of enforcing this liability, and, therefore, but one assessment, as the statute certainly does not authorize an assessment which could not be enforced by suit."

It is further urged, in behalf of the plaintiff in error, that as the liability of a shareholder of an insolvent national bank for all contracts, debts and engagements of such association to the extent of the amount of his stock therein, at the par value thereof, in addition to the amount invested in such shares, is contractual in its nature, it therefore follows that the general rule that the plaintiff cannot split up a single and entire cause of action and make it the subject of different suits applies.

We do not deem it necessary in the case before us to enter at length into the discussion suggested. It is sufficient that, by entering into the relation of a shareholder in a national banking association, the plaintiff in error subjected himself to the obligation created by the statute, and the only question is whether the Comptroller of the Currency has power to make and to enforce by a suit at law more than one assessment upon the shareholders of an insolvent national bank, if necessary to pay the debts thereof. The general purpose of the statute undoubtedly was to confer upon the creditors of the bank a right to resort to the individual liability of the shareholders to the extent, if necessary, of the amount of their stock therein, and it would be a singular construction of law that would empower the Comptroller, by making an inadequate assessment, to relieve the shareholders, upon paying such assessment, from their entire liability.

The logic of the plaintiff in error requires him to convince us that his voluntary payment of one assessment, made when the Comptroller was imperfectly acquainted with the amount of the bank's indebtedness, amounts to a satisfaction *in toto* of his obligation. Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only

be made by a court when compelled by the necessary meaning of the language. The inconvenience that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

If it be the duty of the Comptroller to give the creditors of an insolvent national bank the remedy providing for the individual liability of the shareholders, and if the law be that he can do so by one assessment only, then he must, no matter what the condition of the bank may appear to be, make an assessment upon the shareholders up to the entire amount of their liability. In many instances, the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thereon upon the creditors.

There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences.

In *Kennedy* v. *Gibson*, (8 Wall. 498,) some aspects of the question were considered. Mr. Justice Swayne said:

"The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

"The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole is sought to be recovered, the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount to be collected

shall be formally ascertained. This would greatly protract the final settlement and might be attended by large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the result in many cases can not be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying the demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

These observations clearly imply that the Comptroller, in the exercise of his discretion, may levy successive assessments as they may appear to be necessary. If the power can be exercised only once no reason is apparent why equity should have jurisdiction for the collection of an assessment less than one hundred per cent. If the stockholders' liability is fixed once for all by the first assessment of the Comptroller, the legal remedy for the collection of a ten per cent assessment is as full, adequate and complete as it is for the collection of the one hundred per cent assessment. The reason why, when the assessment is for the one hundred per cent, the proceedings must be at law, and when for a less amount it may be in equity, is obvious. When the full amount is assessed there can be but one suit against each stockholder. He is suable for his full liability at once, and there is no reason for equitable jurisdiction. If a partial assessment is made, there may be other assessments, when the receiver has liberty to sue at law for even a partial assessment, though equity has concurrent jurisdiction to prevent a multiplicity of suits.

*Casey* v. *Galli*, (94 U. S. 673,) was the case of a suit at law by the receiver of a national banking association to enforce the individual liability of a shareholder. It was there contended that the defendant was bound to contribute ratably, and that the proper amount could be ascertained only in equity; that the defendant was bound to contribute ratably a large sum; that this sum was not stated in the declaration, and hence what would be ratable and proper did not appear; that the obligation of the defendant was to pay into the hands of the Comptroller of the Currency a ratable portion of the debts of the association proved before him, and that the declaration did not show that any debts had been so proved; and that the declaration demanded a larger sum than the defendant is required by the statute to pay, and also an additional sum by way of interest. But it was held by this court that "in regard to the first three of these objections it is sufficient to say that *Kennedy* v. *Gibson*, (8 Wall. 498,) is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the Comptroller; that his de-

mination cannot be controverted by the stockholders in suits against them, and that, when the order is to collect the full amount of the par of the stock, the suit must be at law. It is unnecessary to reproduce the reasoning of the court in support of these propositions. The sum to be paid being liquidated, and due and payable when the Comptroller's order was made, it follows that the amount bears interest from the date of the order."

In *United States* v. *Knox*, (102 U. S. 422,) an attempt was made to enforce a deficiency, caused by the insolvency of some of the shareholders of an insolvent national bank, against solvent shareholders, but it was held that the liability of the shareholders was several, and was not affected by the failure of any other shareholder to pay the amount assessed against him, and it was said by this court that "although assessments made by the Comptroller, under the circumstances of the first assessment in this case, and all other assessments, *successive or otherwise*, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders."

*Germanica National Bank* v. *Case*, (131 U. S. Appendix, 144,) was a case where the Comptroller had levied an assessment for an amount on each shareholder, not sufficient to justify an appeal from the Circuit Court of the United States, and where a motion to dismiss the appeal was made in this court, but the motion was denied, Chief Justice Waite saying, "If the decree asked and obtained in this cause had been confined to an order for the payment of the seventy per cent upon the amount of the stock held by the appellants respectively, which the Comptroller of the Currency has already instructed the receiver to collect, the objection taken by the appellee to our jurisdiction might have been good; but the decree as as given goes further, and after providing for the seventy per cent, adjudges that each of the appellants shall be liable to further contribution as stockholders until a sufficient sum is realized to pay the debts of the bank, and that the bill be retained until it shall be certain that no further contribution will be required. This fixes the liability of each of these appellants to contribute in this suit to the extent of the nominal amount of his stock if necessary, and as the bill alleges that at least twenty-five per cent more will be required, it is apparent 'that the matter in dispute' is not alone the amount already decreed, but a sum in addition that may amount to thirty per cent of the stock, and is now expected to reach twenty-five per cent. Their liability generally as stockholders to make contribution has been finally established. That can never again be contested in this suit except under this appeal. For the purposes of jurisdiction, we may consider that as in dispute which would be settled by the decree if it had not been appealed from." The right of the Comptroller to levy a further assessment was thereby plainly implied.

*Bushnell* v. *Leland*, (164 U. S. 684,) was a late case, in which the power of the Comptroller to determine the necessity and amount of an assessment upon the shareholders was challenged on constitutional grounds, but it was held, in the language of Mr. Justice White: "All these alleged errors may be reduced to the simple contention that under the national banking law the Comptroller of the Currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and that the lodgment of authority in the Comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power, in violation of the Constitution. All of these contentions have long since been settled, and are not open to further discussion. (*Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 674; *United States* v. *Knox*, 102 U. S. 423.)"

The precise question raised in the present case has several times been argued and determined in the lower Federal courts. In *Aldrich* v. *Yates*, (95 Fed. Rep. 78,) the question was thus stated and answered by District Judge Evans in the Circuit Court for the District of Kentucky: "The question, then, remains, has the Comptroller of the Currency the power to make a second assessment in any event? The ultimate liability of the shareholder in such cases is for the full amount of the par value of the stock, under the statutory conditions, if by the Comptroller they are found to exist. A mistake of that officer in making an estimate of the amount of a needed assessment cannot be held to release the shareholder from the full statutory liability. A mistake of such a character would be natural, if not inevitable, in many instances, in view of the uncertain value of assets; and the indisposition, in the first instance, to make an assessment unnecessarily large, may well excuse its not being done, when there is certainly no statutory provision, prohibiting, in terms or by necessary implication, further assessments, if the necessity exists. In practice, second assessments have frequently been made. The court is of opinion that such a course is within the power of the Comptroller, in the exercise of his duty to see that theliability of the stockholder is sufficiently enforced to pay the debts of the bank, and that practice has been recognized as proper by the Supreme Court. (*United States* v. *Knox*, 102 U. S. 422.)"

In *Aldrich* v. *Campbell*, (97 Fed. Rep. 663), it was held by the Circui Court of Appeals for the Ninth Circuit, that the action of the Comptroller of the Currency in ordering an assessment against the stockholders of an insolvent national bank, whether a first assessment or one subsequently made, is a determination of the necessity for such assessment,

which is conclusive on the stockholders, and cannot be questioned by them in any litigation which may ensue, either at law or in equity.

In *Deweese* v. *Smith*, (97 Fed. Rep. 309,) it was held by the Circuit Court that a judgment against a shareholder of an insolvent national bank on a first assessment was a bar to a second suit brought to recover a later assessment, but this judgment was reversed by the Circuit Court of Appeals for the Eighth Circuit, in *Deweese* v. *Smith*, (106 Fed. Rep. 438.) And, as already stated, the Circuit Court of Appeals for the Seventh Circuit held in the case now before us that it was discretionary with the Comptroller to make one or more assessments, (*Studebaker* v. *Perry*, 102 Fed. Rep. 947), Woods, Circuit Judge, saying:

"The dominant purpose of the parts of the statute touching this question is that the shareholders of an insolvent national bank shall be liable for its debts 'to the extent of the amount of their stock therein,' and rules of construction are not to be invoked in a way to defeat that purpose. Under the direction of the Comptroller the receiver is authorized to enforce the shareholders' liability; but the power to enforce does not include a power to cut off or limit, and by no proper application of general rules of construction can the statute be so read as to permit the failure of its main design."

The cases cited by the plaintiff in error wherein courts of high authority have held that, where some particular act involving judicial discretion is to be performed by an executive officer, the power is exhausted by its single exercise, are not applicable to cases like the present, where the law merely provides that the shareholder shall pay what may be necessary to meet the debts and obligations of the bank. How much that is may not be ascertained at once, but as it is important that the settlement shall progress without delay, it is a reasonable construction of the statute that, while it is just and for his benefit that the stockholder be called on for no more than seems to be necessary, so is it just to the creditor that further calls may be made when necessary. This is a case where the power to assess belongs exclusively to the Comptroller, and the power to enforce the assessment belongs to the courts, and the construction contended for on behalf of the plaintiff in error confuses the remedy provided for by this statute of the United States with the ordinary remedy for the enforcement of statutory liability of stockholders by the courts.

It is finally argued on behalf of the plaintiff in error that the doctrine of contemporaneous and practical construction put upon a statute by executive officers is applicable. It is said that former Comptrollers of the currency held, in several instances, that the power to assess under the national banking law was exhausted by a single exercise; that subsequent Comptrollers ought not to have departed from that construction; and it is urged that this court should, by its decision in this case, set aside the construction at present prevailing and restore the former one.

The doctrine invoked is a useful one, but its application should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction, and rights have accrued by reason of such reliance. The rule is well expressed in Cooley on Constitutional Limitations, sec. 69, (5th ed.):

"If the question involved is really one of doubt the force of their (officers') judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind. Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law and not allow intrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmaker."

That the language of the statute under consideration is plain and its construction free from doubt are sufficiently shown by the decisions of the courts heretofore cited; and it would be absurd to claim that the plaintiff in error bought his stock in a national banking association with a right to rely on the contingency that the Comptroller might inadvertently or mistakenly make an insufficient assessment should the bank become insolvent.

The judgment of the Circuit Court of Appeals is

*Affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*